THE OPERATION OF THE MAXIM

WHAT CANNOT BE DONE DIRECTLY CANNOT BE DONE INDIRECTLY IN PUBLIC LAW

* * *

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This thesis is my own original work.

[Signature]
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D.K.S.
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This thesis is concerned with a formal problem which arises in the judicial review of laws limiting the range of governmental powers. Vast problems of a legal nature are posed in the observance of limitations imposed on governmental powers. Presumably the solution must be found in the working of judicial machinery - courts being the watchdog of constitutional provisions; no-one would deny the role played by courts in the growth and development of constitutionalism. The judicial practice involves a set of "unwritten" rules for the guidance of courts in the understanding (or interpretation) of "written" laws, including written constitutions. One of such rules is the observance of "good faith" in the exercise of governmental powers, and it is implied in the maxim 'What cannot be done directly cannot be done indirectly'.

This study is confined to English language systems, and to predominantly English common-law systems; South Africa is included, but the South African cases considered are also mainly English common-law in their
ideological background. Nevertheless, the range of constitutional and administrative systems is reasonably wide.

In casual conversation, even among lawyers, one often gets an impression that the maxim has not much force in limiting the acts or actions of governments, since so many schemes, which may be of great consequence politically or otherwise, have received the approval of courts even though they were designed to achieve something that was not permissible, or have been carried through without judicial challenge. Here an attempt is made to examine the implications and intricacies in the operation of the maxim and assess its importance or usefulness as a rule of constitutional interpretation. It is a selective, not an exhaustive, study. The aim is to focus attention on the problems emphasised here and stimulate further detailed examination from a similar point of view. The discussion is mainly on the level of legal formalism, and no attempt is made to analyse the impact of social, economic or political factors on judicial practice.
CHAPTER I. Introduction.

The origin of our maxim is not clearly traceable, though it has some resemblance to two of Coke's Legal Maxims which primarily relate to the field of private law; however, one of them is occasionally mentioned in the field of public law conveying the same sense as that of our maxim. But it is the doctrine of ultra vires that implies our maxim as one of the grounds of invalidation and established its operation more specifically in the field of public law.

PART ONE. Operation of our Maxim in Constitutional Law - General.

Some features of the operation of our maxim are examined by reference to the constitutions of the United States, Canada, Australia, and South Africa.

CHAPTER II. United States of America.

The inquiry is confined to the powers to tax and to spend, as their use appears to be readily susceptible of achieving something not within the Congressional power. It would be an improper use of the power to tax if a tax imposed is of a
confiscatory nature, or highly exhorbitant, or with the sole purpose of penalising certain conduct, and also if it is accompanied by an examptron on condition requiring the surrender of guaranteed liberties. Similarly, it would be an improper use of the power to spend if governmental aids or benefits were offered to citizens, or to states, on conditions (as instruments for the regulation of conduct) which have no relation to legitimate public interest, or operate in an arbitrary or unreasonable fashion, or tend to invade guaranteed liberties. The same is equally true in cases of States' powers although unenumerated.

CHAPTER III. Canada.

The double enumeration of legislative powers - one list for the Dominion Parliament and the other list for the provincial legislatures - creates a situation where some overlapping between the subject-matter of the two jurisdictions is bound to occur, and thus provides a fruitful area for the application of our maxim. It is all the more so because many powers, including the taxing power,
are defined by reference to purpose. Our maxim may also apply to a situation involving inter-delegation of powers between the Dominion Parliament and provincial legislatures.

CHAPTER IV. Australia.

The possible occasions for invoking our maxim are many; most of the examples are from decided cases, but some well-known "devices" not the subject of judicial decision are mentioned. The most obvious case is that of the taxing power, Commonwealth or State, which may be used to achieve something that is prohibited or not within the powers of the legislature concerned. There is uncertainty as to the limits of the use of that power. One extreme is Barger's Case\(^1\), which restrained the Commonwealth from using exemption from tax as a sanction from enforcing specified conduct in any field; the other extreme is Osborne's Case\(^2\), which permitted the Commonwealth to tax a particular occupation or article as heavily as it pleases in order to achieve

\(^1\) R. v. Barger (1908) 6 C.L.R. 41.
\(^2\) Osborne v. Commonwealth (1911) 12 C.L.R. 321.
*indirect* purposes. The High Court appears to have been more favourably disposed towards the latter approach, although the former has never been overruled - in fact it is usually referred to in terms implying its correctness. Other examples are provided by the Commonwealth appropriation and defence powers; these powers involve the notion of purpose and are not without limits. On the other hand, s.96, the power to make grants to the States, being a non-coercive power, illustrates a situation where our maxim is likely to have limited (or no) application.

CHAPTER V. South Africa.

The Constitution formally contains no limitations or restrictions on the law-making powers of the Union Parliament. But before the passing of the South Africa Act Amendment Act, 1956, there were provisions which "entrenched" the franchise of the coloureds in the Cape Colony. As to these provisions, our maxim received a fairly extensive application in restricting the Union Parliament from achieving the prohibited purpose; it did not matter that the prohibition related only to
procedure. However, after the Amendment Act courts were left with no jurisdiction to review Acts of Parliament in this context.

PART TWO. Operation of our Maxim in Administrative Law.

This part illustrates the operation of our maxim as implied in the judicial control of administrative authorities. The field of administrative law provides more varied aspects of our maxim's application, and without such discussion this analysis would be incomplete. However, the present discussion is restricted, because fairly exhaustive studies have already been made in this regard, notably that of Professor S. A. de Smith. The bulk of administrative cases is formidable, but for the most part they do not involve the analytical difficulties of constitutional cases, being more readily related to factual problems of good faith.

CHAPTER VI. Doctrine of Ultra Vires.

The underlying application of our maxim can be seen in the operation of the concepts of "unauthorised or improper purpose", "extraneous or irrelevant considerations", and "unreasonableness": (a) "unauthorised or improper purpose" implies an exercise
of discretionary power by reference to purpose not authorised under the Act; if the authorised purpose is vague or indefinite, courts try to define its scope by looking into the context and setting of the Act; even if there is no reference to purpose in the Act, courts do not assume the conferment of an unfettered discretion in absolute terms. However, in the absence of any purpose being expressly mentioned, or if mentioned it being of vague or indefinite description, courts are less likely to find a ready basis for preventing an abuse of statutory powers. There is a difference in approach between an ultra vires act done in good faith and an ultra vires act done in bad faith. In the latter case courts may permit the tendering of evidence as to the extraneous or ulterior motives which come into consideration, whereas in the former they may distinguish between purpose and motive and regard the presence of motive, authorised or unauthorised, as immaterial. In case of "authorised" and "unauthorised" purposes inextricably mixed, it is suggested that an exercise of discretion by reference to them should be declared ultra vires irrespective of which purpose is "dominant" or
"substantial"; (b) "Extraneous or irrelevant considerations" imply an exercise of discretionary power by reference to irrelevant collateral matters, even though the authority may have acted in complete good faith. What are, and what are not, legitimate considerations is open to wide differences of opinion. However, the wider the discretion the less possible it becomes to identify relevant considerations. Moreover, it is rather a matter of construction depending upon the nature and character of the Act. If an authority does not state its reasons, it is all the more difficult to challenge on grounds of irrelevant considerations; (c) "Unreasonableness" has in practice virtually come to embrace other grounds of invalidity.

CHAPTER VII. Supervisory Jurisdiction.

To the extent that judicial control is ousted, the operation of our maxim is restricted; but to the extent that courts resist or restrict the operation of such clauses, they may be said to be putting our maxim into effect. It may generally be said that these clauses do in some cases restrict the scope of judicial control; but there is a tendency
for the courts to find a way around them in what they regard as gross cases of abuse of power. In the Australian federal sphere, the High Court is given specific jurisdiction by s.75(v) of the Constitution to issue mandamus or prohibition to federal tribunals, and such clauses may be of no effect in so far as a federal tribunal purports to act beyond the powers of the federal Parliament.

**PART THREE. Some Special Problems of Constitutional Law.**

This part deals with special problems relating to 'prohibition' situations and legislative schemes. 'Prohibition' situations are illustrated by s.92, s.51(ii), s.51(iii), s.99, s.116 and s.117 of the Australian Constitution. However, the number of relevant decided cases and even judicial dicta is very unevenly distributed between these topics; as to some a fair body of authoritative illustration is given but as to others we can only speculate. Legislative schemes raise problems different from those of single statutes; a number of statutes, each prima facie valid, may be so designed as to achieve by their joint effect something that could not be achieved by a single statute.
CHAPTER VIII. S.92 of the Australian Constitution (freedom of inter-State trade, commerce and intercourse).

There are not very many cases in which our maxim has found express application; however, the interpretation of s.92 has assumed a form which has the potential of providing an extraordinarily flexible judicial device for striking down legislation designed to infringe s.92 by "circuitous means" or "concealed designs": Some illustrations from decisions and dicta are given.

CHAPTER IX. Preference and Discrimination or Lack of Uniformity in the Australian Constitution (viz. s.51(ii), s.51(iii) and s.99.)

Having regard to the central place our maxim has come to occupy in relation to s.92, one might reasonably have expected the courts likewise to be astute in recognising evasions of the substantial purpose of those sections. In fact, this has not happened. Occasional dissents, however, indicate the lines along which this part of the law might have developed.

CHAPTER X. S.116 of the Australian Constitution (religious toleration).

This guarantee, although in form merely a restriction
of legislative power, has a history giving it more the character of the American "civil liberties". Paucity of authority makes confident opinion impossible, but both substantial and procedural difficulties expose this guarantee to comparatively easy evasion.

CHAPTER XI. S.117 of the Australian Constitution (discrimination on ground of "residence").

Since there is only one decision, it is not safe to say to what extent our maxim would apply. However, this prohibition is capable of evasion by "devices", and capable of protection by the ready application of our maxim.

CHAPTER XII. Legislative Schemes.

In general courts have not readily examined the validity of statutes constituting legislative schemes by reference to their joint effect. In the United States, the tendency is to support a legislative scheme unless it is manifestly unjust or patently outside the ambit of legislative powers. In Australia, it is difficult to conceive circumstances in which a legislative scheme would be held invalid even when its existence is patent and designed to
evade a constitutional prohibition; still less so if the ultimate aim is to achieve some purpose only impliedly forbidden by the Constitution, or some purpose merely ultra vires, or if the interaction of the relevant statutes is not evident on inspection. Perhaps in Canada, there might be slightly better opportunity to strike down a legislative scheme because of the double enumeration of powers and the fact that many powers are defined by reference to purpose. However, in South Africa any reference to object or purpose of a legislative scheme was regarded as altogether irrelevant. To the extent that courts have permitted such schemes, they may be regarded as a limitation on the operation of our maxim.

PART FIVE. Logical Status, Meaning and Force of our Maxim.

In this part an attempt is made to understand and analyse the underlying idea of our maxim in the light of the above discussion.

CHAPTER XIII. Logical Status of our Maxim.

In the present study emphasis is put on the analysis of facts and situations and the approach is rather
analytical than evaluative. One of the cardinal rules of interpretation in private law is the observance of "good faith", which is implied in our maxim, and this rule has been logically adopted in the field of constitutional law wherever there is provision for a limited governmental power. Even if our maxim is provided as part of positive law, one can imagine its having no more significance than it has in its present position as "unwritten" or "extra-positive" law.

CHAPTER XIV. Meaning of our Maxim.

The main difficulty with our maxim arises from the words "directly" and "indirectly"; it assumes that a government authority with limited powers, which has power to do something "directly", may also employ that power so as to do other things which may be described as "indirect". One possible explanation is that our maxim attributes one and only one characterisation attribute to a law; in other words, the problem of characterisation is to distinguish "direct" characteristics of a law from "indirect" or "less direct" ones. The other explanation is that our maxim is concerned with "mala fides" or "disguises";
the "indirection" is in the dressing up. It is relatively simple to apply the latter distinction in private law and many administrative law contexts, but relatively difficult in constitutional contexts.

CHAPTER XV. Force of our Maxim.

For the present purpose, the discussion is confined to seventy-four constitutional cases. An analysis of these cases show that our maxim has considerable force in exercising restraint on legislatures with limited powers both in the "prohibition" and the "ultra vires" situations, although some specific areas provide more opportunities for the application of our maxim than others, e.g., a "purposive" power against a "non-purposive" power.
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CHAPTER I

Introduction

In a federal constitution, the legislative jurisdiction is divided between the federal and the regional governments, and the courts have power to determine the validity of enactments by reference to power conferred on the legislature concerned. If a legislature is prohibited from violating any constitutional provision, it cannot do so even "under the guise, or the pretence, or in the form of an exercise of its own powers". Though a legislature purports to act within the limits of its powers, yet it may in substance and reality transgress those powers, the purported exercise being merely a "pretence or disguise". Will such a transgression be permitted by the courts? In other words "the legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field".

All this is implied in the application of the maxim "what

cannot be done directly cannot be done indirectly. This maxim, as such, has played a significant part in determining whether a particular piece of legislation in question is within the competence of the legislature enacting it - a problem of characterisation, which has become a central problem of constitutional interpretation in a federation.

These days in order to keep pace with the changing times it has become almost inevitable for the governments in a federation to undertake functions not anticipated at the time of making the constitution, e.g., to conform to the modern concept of a welfare state, or to provide for economic integration on a national level, or to enforce obligations assumed on behalf of the state at International Conventions. The enlargement of the governmental activities leads to an increase in expenditure, which ultimately results in an increased demand of finances. But constitutional difficulties arising from the division of legislative powers and the imposition of prohibitions upon the exercise of these powers, have led to the frustration of

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many federal schemes adopted to meet a crisis on a national scale\(^1\), and at times to an unfortunate hesitation in dealing with pressing problems\(^2\), whereas the States of the federation suffered from lack of resources to finance projects and programmes sponsored by them. At the same time, attempts by way of various expedients and devices such as 'legislative schemes' comprising two or more Acts through the co-operation of the federal and the regional governments or otherwise, or grants-in-aid given to the regional governments, have been made, and have succeeded to a certain extent in achieving results which could not have been achieved directly. Such expedients or devices in so far as recognised by the courts disclose limitations upon the operation of the maxim 'what cannot be done directly cannot be done indirectly'.

The purpose of the present study is to examine the operation of the maxim 'what cannot be done directly cannot be done indirectly' and to work out its scope as a principle of interpretation in the realm of constitutional law and administrative law. However, it would be a stupendous task


\(^2\) See the Report from the Commonwealth Parliament's Joint Committee on Constitutional Review (1959), at pp.120-132.
to appreciate correctly and deal with all the complexities and obscurities involved in its application by reference to all the federal constitutions in existence at the present day. Hence an attempt is made at a general study of its operation; bringing out its importance in the United States of America, Canada and Australia, and also in South Africa; then follows a more detailed examination of the application of the maxim in Australian constitutional law.

II

The origin of our maxim, particularly in the field of constitutional law - how it came into existence and under what circumstances it was first applied - is not clearly traceable. But a near approach to its underlying idea is to be seen in the following two maxims of Lord Coke:

(i) *Quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud*. ¹

When anything is prohibited, everything relating to it is prohibited.

(ii) *Quando aliquid prohibetur ex directo prohibitur et per obliquum*. ²

When

¹ Inst. 48.
² Coke on Littleton (19th ed.) at p. 223.
anything is prohibited directly, it is also prohibited indirectly.

The first maxim is discussed by Coke under the Chapter on Magna Carta: "Every oppression against Law, by colour of any usurped authority, is a kind of destruction for, Quand o aliquid prohibetur, prohibetur et omne per quod devenitur ad illud. And it is the most oppression that is done by colour of Justice". This does not lead us anywhere as to the manner and the circumstances of application of the maxim.  

This maxim is also mentioned in Broom's Legal Maxims as illustrating prohibition implied by law in transactions dealing with transfer of property. For example, an Act provided that a bank consisting of more than six partners, doing business within sixty-five miles of London, could not accept, in the course of such a business, a bill of exchange payable at less than six months from the time of acceptance; a London bank entered into an agreement with a Canadian bank that its manager, not being a partner therein, should accept bills drawn on him by the Canadian bank and that the London bank should provide funds for the payment of such bills.

1 It is one of the instances where it seems Coke has used a maxim arbitrarily without any reference or context.

2 (9th ed.) at p. 313.
bills; although the manager was the nominal acceptor, the transaction went through the books of the two banks as if the London bank had been the acceptor. The acceptance of such bills, in execution of such an agreement was held unlawful. Tindal C.J. remarked that "Whatever is prohibited by law to be done directly cannot legally be effected by an indirect and circuitous contrivance." So a transaction, which is a mere device to by-pass the law under the colour, guise or pretence of doing something that is expressly prohibited, will not be held valid.

Maxwell also referred to the maxim while discussing rules of construction to prevent evasion. In the Magdalen College Case, a question was raised whether the King not being specially named in 13 Eliz. e.10, was bound by it. By that statute it was enacted that "all leases, grants, or conveyances to be made by any master and fellows of any college ... of any houses, lands ... to any person or persons, bodies politic or corporate, for a longer term than twenty-one years, shall be utterly void." It was

2 Ibid., at p. 540.
3 Interpretation of Statutes (10th ed.), at p. 114. See also Craies, Statute Law (5th ed.), at p. 233.
contended by the plaintiffs that a lease made to the Queen by Magdalen College for a longer term than twenty-one years was not void as the Queen was not bound by statutes unless named in them. But it was held that the statute extended to restrain the master and fellows of the College from making grants to the Queen, although she was not expressly named in the Act. Lord **Coke** explained:

But it was never seen, that a general Act, made for the maintenance of religion, advancement of learning, and relief of the poor, should be by construction of law so expounded, that a by-way should be left open, by which the said great and dangerous mischiefs should remain, and the necessary and profitable remedy suppressed; for the office of the Judge is, to make such construction as will suppress the mischief, and advance the remedy, and to suppress all evasions for the continuance of the mischief; and such by-way shall never be left open by construction, although it be for the king's benefit.¹

In **Philpott v. St. George's Hospital**², though the bequest in question was held valid within the meaning of the Statutes of Mortmain, Lord **Cranworth** explained that

² (1857) 6 H.L.C. 338. In this case the question related to the validity of the will of Lord Beauchamp, which depended on the construction to be put upon the Act of the 9th Geo. II, c.36; that Act prevented the disposition of lands for charitable purposes. According to the bequest, if any person should purchase and give a piece of land for almshouses the trustees of the will should pay a sum of money to the charity so instituted, but so that no part should be laid out in the purchase of land.
"whenever you can find that anything done that is substan-
tially that which is prohibited, I think it is perfectly
open to the Court to say that that is void, not because it
comes within the spirit of the statute, or tends to effect
the object which the statute is meant to prohibit, but
because by reason of the true construction it is the thing,
or one of the things, actually prohibited."\(^1\) It is summed
up in the remark of Wilmot C.J., that "Whenever Courts of
law see such attempts made to conceal such wicked deeds,
they will brush away the cobweb varnish, and shew the
transactions in their true light."\(^2\)

This maxim has also been used in the interpretation
of prohibitions or restrictions on legislative powers in
the field of public law. For example, in Australia in
Deakin v. Webb\(^3\), the question posed was whether an author-
ity having no power to levy tax on the income of certain
people, has power to make diminution of that income.
Griffith C.J. thought that both were in substance the same
and said:

If it has no power, it cannot affect the same
purpose by the use of another form of words. The
\(^1\)Ibid., at p. 349. Also refer to Jefferies v. Alexander
(1860) 31 L.J. Ch.9, at p. 14 per Blackburn J.
\(^2\)Collins v. Blantern (1767) 2 Wilson K.B. 341, at p. 349.
\(^3\)(1904) 1 C.L.R. 585.
corollary of the maxim quando lex aliquid alicui concedit, concedit et id sine quo res ipsa esse non potest, on which this Court mainly based its judgment in *Emden v. Pedder*, is quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud. When the law prohibits the doing of anything, the prohibition cannot be evaded by doing something which is substantially the same, merely by using a different form of words to describe it².

Similarly in *Bank of New South Wales v. Commonwealth³*, the question related to the validity of the Banking Act, 1947, one of whose objects was "the taking over by the Commonwealth Bank of the banking business of private banks and the acquisition on just terms of property used in that business". Dixon J. while discussing acquisition of the interest of the shareholders in such banks, observed: "I have reached the conclusion that this is but a circuitous device to acquire indirectly the substance of a proprietary interest without at once providing the just terms guaranteed by s.51(xxxi) of the Constitution"; and further explained: "When a Constitution undertakes to forbid or restrain some legislative course, there can be no prohibition to which it is more proper to apply the principle embodied in the maxim quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud."⁴

¹(1904) 1 C.L.R. 91.
²(1904) 1 C.L.R. 585, at pp. 612, 613.
³(1948) 76 C.L.R. 1 (H.C.).
⁴Ibid., at p. 349.
Dixon C.J. again referred to this maxim in the context of s.92 of the Constitution in *Grannal v. Marrickville Margarine Pty Co.*\textsuperscript{1} Hence it may be said that the maxim in its application has come to convey the same sense as that of the maxim *what cannot be done directly cannot be done indirectly*\textsuperscript{2}.

The second maxim appears to be much nearer our maxim, or literally carries the same meaning. Referring again to Broom's *Legal Maxims*\textsuperscript{2}, it is noticed that it is discussed in the same context as the first one (mentioned above) and both maxims appear to convey the same idea. Coke discussed it in relation to a problem of conveyancing\textsuperscript{3}. "If a transfer is made upon the condition that the transferee shall not alien the land to any, the condition is void, but if the condition be such that the transferee shall not alien to someone, or to any of his heirs, or of the issue of such a one, then such a condition which does not take away all the power of alienation from the transferee, or any of his heirs, or of the issue of such a one, is good because the transferor does not restrain the transferee of

\textsuperscript{1} (1955) 93 C.L.R. 55, at p. 78.
\textsuperscript{2} *Loc. cit.*, at p. 313.
\textsuperscript{3} Coke on *Littleton* (19th ed.) at p. 223(b). Also refer to Cheshire, *Modern Real Property* (7th ed.) at pp. 315, 316.
all his power to alienate". Therefore if the transferee restricts the right of alienation of the transferee in such a fashion that it looks on the face of it as if it is a partial restraint, though in reality being a total restraint, the maxim will apply and the condition shall be void and inoperative. In order to find out whether there is a total restraint or partial restraint, the courts will see whether the transferee has been substantially deprived of his power of alienation. This is closely similar to cases arising under the first form of the maxim. However, the second form does not seem to have been used so frequently as the first one in the field of constitutional law.

III

The application of our maxim is also involved in the doctrine of ultra vires, a product of corporation law and laid down in 'clear and unqualified' language in the middle of the nineteenth century. At that time the doctrine

1 The writer could find its reference only in one case: Duncan v. Queensland (1916) 22 C.L.R. 556, at p. 625.
emphasised the lack of capacity in corporations to do any ultra vires act. "The question is not what they may do, but what they can do". Statutory corporations as opposed to corporations at common law are created by Acts of Parliament for the attainment of certain purposes, and thus have limited powers. They cannot do anything that is contrary to the provisions of a statute and an act done beyond the scope of their powers would be ultra vires and void.

This doctrine first came to be applied to cases dealing mostly with railway companies which were created by Parliament limiting in scope the exercise of their activities. For example, in *Colman v. Eastern County R. Co.*

1 Street, loc. cit., at p. 14.

2 Statutory corporations have been distinguished from corporations at common law (based on royal charter) on the basis of a statement by Lord Coke in the *Case of Sutton's Hospital* (1612) 10 Co. Rep. 23a, at 30b, saying that the latter can do everything that an ordinary man can do: see e.g., *Attorney-General v. Manchester Corporation* [1906] 1 Ch. 643, at p. 651; *Attorney-General v. Leicester Corporation* (1943) Ch. 86, at p. 93. But this doctrine has been doubted: see Jennings, *Principles of Local Government Law* (3rd ed.), at p. 146; Street, loc. cit., at pp. 20-22.

of increasing traffic on their railway, proposed to
guarantee certain profits and secured the capital of an
intended steam-packet company (for which there was, however,
no authority to be found in the Act creating the railway
company) who were to act in connection with the railway.
It was held that such a transaction was not within the
scope of their authority and accordingly restrained them
from carrying it into effect. "The powers which are given
by an Act of Parliament, like that now in question", said
Langdale, M.R., "extend no further than is expressly stated
in the Act, or is necessarily and properly required for
carrying into effect the undertaking and works which the
Act has expressly sanctioned". This view was approved by
the House of Lords as early as 1855 in Eastern Counties Ry.
v. Hawkes where Lord Cranworth said that: "It must,
therefore, be now considered as a well-settled doctrine
that a company incorporated by Act of Parliament for a
special purpose cannot devote any part of its funds to
objects unauthorised by the terms of its incorporation,
however desirable such an application may appear to be".

It was also recognised later that if a statutory

1 Ibid., at p. 14.
2 (1855) 5 H.L.C. 331.
3 Ibid., at p. 348.
corporation attempted to do something that was beyond the scope of its powers by adopting circuitous means, that attempt would be declared as **ultra vires**. The leading case is **Riche v. Ashbury Railway Carriage Co.** ¹, where a statutory corporation, its object being substantially to carry out the business of general contractors, had power to act as mechanical engineers and general contractors, and certain contracts to construct railways were made by the directors on behalf of the corporation. It was argued that inasmuch as those contracts have been ratified and adopted by shareholders, they were binding on the company. But the House of Lords held that the contracts which were not authorised by the Act could not be made valid subsequently by any action on the part of the shareholders even if such action was unanimous. "The shareholders", explained Lord Cairns, "would thereby by unanimous consent have been attempting to do the very thing which by the Act of Parliament they were prohibited from doing"².

This doctrine was extended to municipal corporations which "ceased to be forms of property and became instruments

¹ (1875) L.R. 7 H.L. 653.
of government" after the passing of the Municipal Corporation Act, 1835. It would, therefore, be ultra vires the corporation if a municipal by-law is made in excess of the statutory power authorising it or repugnant to that statute. Thus a corporation might be restrained from using its funds for improper purposes or acting in an unauthorised manner. A by-law might also be held ultra vires on the ground of unreasonableness.

The underlying notion of this doctrine later found an exclusive application in the field of administrative law generally, as that law became more systematised and recognised as a distinct branch of law. Modern governments

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1 Jennings in *A Century of Municipal Progress 1835-1935*, *loc. cit.*, at pp. 420, 421. Refer also to Street, *loc. cit.*, at p. 15.

2 It is defined by Lord Russell in *Kruse v. Johnson* [1898] 2 Q.B. 91, at p. 96, as "an ordinance affecting the public or some portion of the public imposed by some authority clothed with statutory powers ordering something to be done or not to be done and accompanied by some sanction or penalty for its non-observance. ... Further, it involves this consequence - that, if validly made, it has the force of law within the sphere of its legitimate operation."

3 E.g., Attorney-General *v. Lichfield Corporation* (1840) 11 Beav. 120; Attorney-General *v. Merthyr Tydfil Union* [1900] 1 Ch. 516.


have to deal with diverse and complex problems of national and international character and Parliaments tend to lay down general principles and leave the details to be filled up later in the form of rules or regulations by Ministers or any other competent authority. Framing of rules or regulations, as in the case of municipal by-laws, is subject to the control of Acts of Parliament authorising relevant authorities to do so; they are supposed not to act beyond the scope of their powers and if they do so they act without authority. Courts thus have power to determine the validity of rules or regulations by reference to the power authorising them and if it is found that the power has been exceeded\(^1\), or exercised in a manner not authorised by the statute\(^2\), or repugnant to the general law\(^3\), it would be declared as **ultra vires**.

But one of the grounds on which courts can further declare municipal by-laws and departmental regulations as **ultra vires** is if the power conferred on an authority is

abused or exercised not bona fide. The power must be used for the purpose for which it is conferred. For example, in Municipal Council of Sydney v. Campbell\(^1\), a local authority had statutory power to acquire compulsorily land required for purposes of civic extension and improvement. When the land was acquired merely because of its probable increase in value, the court held that the local authority was endeavouring to give a new form to the transaction and exercising its power for a purpose differing from that specified in the statute. Similarly, in Brownells Ltd. v. Ironmongers\(^2\) Wages Board\(^2\), a wages board empowered to determine the working hours of employees and payments for overtime work, provided a penalty for employees working in shops after 5.45 p.m. The High Court held it to be invalid on the ground that the wages board had no power to regulate hours of trading as distinct from hours of working, and further that the hours specified conflicted with the provisions of the Shops Act 1925-1945. "The Board is, under the guise or pretence of fixing rates for overtime", said Latham C.J., "seeking to impose what are in substance penalties upon employers for keeping shops open at a time when the Legislature had said that it shall be lawful to

\(^1\) [1925] A.C. 338.
\(^2\) (1950) 81 C.L.R. 108.
keep shops open". Toronto v. Forrest Hill is another recent example of an abuse of power. In that case the Supreme Court of Canada held that s.41 of the Municipality of Metropolitan Toronto Act, 1953 (Ont.), which authorised the passing of by-laws for regulating the supply of water "in order to secure a continued and abundant supply of pure and wholesome water" did not empower the municipality to provide for the flouridation of the existing water supply. While the addition of the contemplated amount of flourine would not affect the quality of water otherwise wholesome, it did not involve a water purpose (which alone was authorised by the statute) but rather a medicinal purpose, e.g., reduction of the incidence of tooth decay. "But it is not", said Rand J., "to promote the ordinary use of water as a physical requisite for the body that flouridation is proposed. That process has a distinct and different purpose; it is not a means to an end of wholesome water for water's function but to an end of a special health purpose for which a water supply is made use of as a means". Thus if an authority upon whom the power has been conferred for a certain purpose, exercises it under a "pretence, guise or colour" so that in

1 Ibid., at p. 120.
3 Ibid., at p. 118.
Substance and reality: it is different from what it was supposed to be contemplated, the courts will declare the exercise of that power as ultra vires. This sort of exercise of power is covered by our maxim.

IV

By-laws and regulations made by local authorities and other administrative agencies are comparable to laws framed by legislatures having powers defined or enumerated in a federal constitution. It is not within the competence of either the federal or a regional legislature to act beyond its powers or trench upon the exclusive powers of the other; and if they do act that way, courts have power to declare their actions as unconstitutional - a function like testing the by-laws of municipal corporations.\(^1\) Tracing historically the precedents and cases which provided a basis for the American doctrine of judicial supremacy, Haines observed:

Referring on some occasions to an overruling law of nature, on other occasions to the fundamental principles embodied in the great English charters of liberties, and, finally, to formally enacted written instruments, colonial and state courts steadily asserted and maintained the right to invalidate acts, and thus they promulgated for the United States and put into an effective form Coke's theory of the supremacy of the courts.\(^2\)

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1. See e.g., Hari v. Secretary of State for India (1903) I.L.R. 27 Bom. 425, at p. 439.
2. Haines, The American Doctrine of Judicial Supremacy (1914) at p. 120.
In the United States it is true that the power of judicial review over Congressional and State legislation and of pronouncing them to be void if they are repugnant to the Constitution was established by Justice Marshall in *Marbury v. Madison* by reference to 'extra-constitutional' concepts so as to place beyond doubt the Supreme Court as the guardian of the Constitution. But the notion of limited or subordinate legislative power had by then taken concrete form in the opinions rendered in state courts. The position of Congress, as Bryce remarked, might "be compared to that of an English municipal corporation or railway company" and "a statute passed by Congress beyond the scope of its powers is of no more effect than a bye-law made ultra vires by an English municipality." It is not difficult to perceive the application of the doctrine of ultra vires to Acts of colonial legislatures as there could be no colonial legislature with unrestricted or unlimited powers. In fact the Privy Council used the same italicised words *ultra vires* to convey the sense of

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1. (1803) 1 Cranch 137.
invalidation of an Act of a colonial legislature\textsuperscript{1}.

The constitutions granted by the British Parliament to Canada and Australia have often been treated by the courts as statutes subject to the ordinary rules of interpretation. Lord Loreburn once referring to the British North America Act 1867, observed that "if the text is explicit the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous ... recourse must be had to the context and scheme of the Act"\textsuperscript{2}. Similar expressions have been used by the High Court of Australia while interpreting the Commonwealth of Australia Constitution Act, 1900\textsuperscript{3}.

However, these constitutions differ from that of the United Kingdom in that the legislatures created therein are not unlimited, but have restricted powers. Thus it is within


the province of courts to see whether the legislatures, federal as well as regional, act within the scope of their powers allocated by the constitution, even though they are supreme within their spheres.

PART ONE

Operation of our Maxim

in

Constitutional Law - General
CHAPTER II

The United States of America

The American constitutional history has been marked by controversies and conflicts involving philosophic and political concepts as to the problems of federalism and its concomitant problems of sovereignty, state-Federal relations, individual freedoms and such other matters. To a certain extent it has been a history of the development of the Supreme Court and the role played by its Justices projecting their individual personalities in the judgments. Thus there have been shifts in judicial opinion - judicial 'activism' to judicial 'self-restraint' and then back to judicial 'activism' - resulting in the overruling of cases from time to time. But our maxim has been recognised since the very beginning and at no time has it been rejected or its application denied. It is true that, at times, cases in which the maxim found its application have been overruled, but that is because of the shift in judicial attitude to policy questions involving philosophic and political concepts which are pre-requisites in determining its scope. No attempt is made here to discuss its operation along with
the historical growth and development of constitutionalism in the United States; instead an endeavour is made to bring out its importance as a principle of constitutional interpretation.

In the United States the federal government is one of enumerated powers (the state governments having residual powers); the constitution is the instrument specifying them, and in its terms authority must be found for the exercise of any power which the federal government assumes to possess. Problems have arisen where the courts had to resort to a principle which is either limited from or analogous to our maxim. In McCulloch v. Maryland, Chief Justice Marshall, referring to the scope of federal powers said: "Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an Act was not the law of the land."1

One of the powers which is readily susceptible to be

1 (1819) 4 Wheat. 316.

2 Ibid., at p. 423. See also Railroad Co. v. Peniston (1873) 18 Wall. 5, at p. 35.
used for the purpose of accomplishing something not within the congressional power is the taxing power. It was established in Bailey v. Drexel Furniture Co.¹ that Congress could not, under the pretext of raising revenue, exercise its taxing power for police power purposes. That case involved the constitutionality of the Child Labour Tax Law which imposed ten per cent. excise tax upon the annual net profits of mines, quarries, factories and other establishments, which during any portion of the taxable year employed children contrary to the regulations established. A company permitted a boy under the age of fourteen years (contrary to the regulations) to work in its factory during the taxable year. It received notice from the tax collector that the company would be assessed at ten per cent. of its net profits under the provisions of the law. It paid the tax under protest and brought suit to recover the amount of the tax upon the ground that the law imposing the tax was unconstitutional. It was contended that the law was in reality a regulation of child labour in the States - an exclusively State function under the Constitution. This criterion was accepted by the Supreme Court. Taxes are primarily imposed to raise revenue and they do not lose their character as

taxes if they incidentally regulate a certain activity. "But there comes a time in the extension of the penalising features of the so-called tax", said Chief Justice Taft, "when it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment". Although Congress did not expressly declare that the employment within the mentioned ages was illegal, it did exhibit its intent to achieve the same result by adopting a criteria of wrongdoing and imposing its principal consequence on those who should transgress its standard.

Also the federal government cannot, in the guise of a tax, impose penalties in addition to any the State may decree for the violation of a state law, irrespective of the fact that it is within its jurisdiction to levy excises as revenue measures regardless of whether they are permitted or prohibited by state or federal law. In United States v. Constantine, a federal law imposed, in addition to $25 excise tax on retail liquor dealers, a special excise tax of $1000 on such dealers when they should carry on the business contrary to state law. The question arose whether the exaction of $1000 in addition by reason solely of violating State

1 Ibid., at p. 38.
2 (1935) 296 U.S. 287. See also Civil Rights Cases (1883) 109 U.S. 3.
law, was a tax or penalty. After the repeal of the Eighteenth Amendment\(^1\), the Supreme Court held it unconstitutional as being highly exorbitant and grossly disproportionate to the amount of the normal tax imposed upon the same business when not in violation of State law. "Disregarding the designation of the exaction; and viewing its substance and application", Justice Roberts said, "we hold that it is a penalty for the violation of State law and as such beyond the limits of federal power"\(^2\). Thus under the guise of a taxing Act the purpose was to usurp the police powers of the States.

Another improper use of the taxing power may be by denying a tax-exemption to claimants who refuse to obey conditions requiring them to surrender rights or liberties guaranteed to them under the Constitution. Thus in

\(^1\) It provides: "After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

"This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission thereof to the States by Congress. [Jan. 29, 1919].""

Speiser v. Randall\(^1\), it was held that to deny a tax exemption to claimants who engaged in certain forms of speech was in effect to penalise them for such speech, and provided the same deterrent as if the State were to fine them for the speech. There the Californian legislature enacted a statute to effectuate a provision in the Constitution of California that tax exemption be denied to persons who advocated the unlawful overthrow of the government of the United States or of a state, or who advocated the support of a foreign government engaged in hostilities with the United States - requiring a property-tax exemption claimant to sign a statement on his tax return declaring that he does not engage in the proscribed advocacy. Without reaching the question of the constitutionality of the State constitutional provision, Brennan J., in an opinion reflecting the views of six members (Clark J., dissenting) of the Supreme Court, held that the statutory provision denied the claimants freedom of speech without the procedural safeguards required by the due process clause of the Fourteenth Amendment\(^2\),

\(^1\)(1958) 357 U.S. 513; see also First Unitarian Church v. County of Los Angeles (1958) 357 U.S. 545.

\(^2\) "Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."
since the statute sought to enforce the constitutional provision through a procedure which placed the burden of proof of non-engagement in the proscribed advocacy on the taxpayer.

It is equally true in the case of State governments, even though their powers are not expressly mentioned in the Constitution (as in the case of federal government). If under the guise or pretext of acting within its powers a State government adopted measures for the accomplishment of objects which are within the federal jurisdiction, it would not be a lawful exertion of its authority. In Woodruff v. Parham\(^1\), the Charter of Mobile authorised that city to impose a tax for municipal purposes. A person claimed that he was not liable to the tax as regards goods which were brought into the State from other neighbouring States of the Union. The Supreme Court declared the law void as interfering with the unquestioned power of Congress to regulate commerce among the States. Similarly in Guy v. Baltimore\(^2\), where the City of Baltimore under its large powers of taxation attempted to impose a certain tax under the form of wharfage, it was held that a State cannot charge vessels

\(^1\) (1869) 8 Wall. 123; cf. Veazie Bank v. Fenno (1869) 8 Wall. 533. See also Crandall v. Nevada (1867) 6 Wall. 35.

\(^2\) (1879) 100 U.S. 434; see also Cook v. Pennsylvania (1878) 97 U.S. 566; Passenger Cases (1849) 7 How. 283.
loaded with products of other States larger fees for the use of public wharves than are charged for vessels loaded with products of the State. Justice Harlan said that the fees could not be regarded "as compensation merely for the use of the City's property, but as a mere expedient or device to accomplish, by indirection, what the State could not accomplish by a direct tax, viz., build up its domestic commerce by means of unequal and oppressive burdens upon industry and business of other States".

But it is not enough for an Act to be declared invalid that another purpose than the one shown on its face may be attributed to the Act, even if the purpose is something not within the lawful jurisdiction of the legislature concerned. The possible abuse of power is not an argument against its existence. In McCray v. United States, the Supreme Court sustained a federal Act levying a tax of ten cents per pound on the manufacture and sale of oleomargarine artificially coloured to resemble yellow butter, when the tax on oleomargarine not so coloured was only a quarter of a cent per pound.

1 Ibid., at p. 443.
pound. The Act was challenged on the ground that its true purpose was not taxation but the regulation of manufacture and sale, and as such it invaded the reserved powers of the States. Justice White's opinion, speaking for the majority, turned upon the Court's refusal to inquire into the motive or intent behind the Act or the result produced. The Court said that the discretion of Congress in the exercise of its constitutional powers to levy excise taxes could not be controlled or limited by the courts because the latter might deem the incidence of the tax oppressive or even destructive.

It may be noted that in the case of powers which cannot be defined by reference to purpose, such as the taxing power, the United States Courts are more hesitant to declare a law invalid on the ground that it is being used as a disguised way of doing something that is not legitimate. In such a case of possible abuse of power, it must be almost apparent on the face of the Act that the power which is sought to be exercised is being used solely to enforce a regulation of matters with respect to which the legislature has no authority to interfere. For example, a tax imposed by Congress must be so heavy as to be confiscatory or highly exorbitant or with the sole purpose of penalising certain

1 In this case it is difficult to distinguish between purpose and motive.
conduit. In the Child Labour Tax Case\(^1\), Chief Justice Taft said that a taxing Act could not be declared invalid just because "another motive than taxation, not shown on the face of the act, might have contributed to its passage"\(^2\); but referring to the facts in question he concluded that "a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed"\(^3\). Similarly in United States v. De Witt\(^4\), it was held that an Act of Congress, which made it a misdemeanor to mix for sale naptha and illuminating oils, or sell such a mixture or offer it for sale, or to sell or offer for sale petroleum containing certain inflammable oils, was invalid as being a mere police regulation and as such void to the extent of its application within a state.

So if Congress could conceal its regulatory or prohibitory purposes beneath the form and language of a statute which appears on its face to be only a taxing measure, the Courts might not receive, or act on, other evidence -

\(^1\) (1922) 259 U.S. 20. For an abuse of taxing power as invading individual freedom see Grosjean v. American Press Co. (1936) 297 U.S. 233; Jones v. Opelika (1943) 319 U.S. 103; Murdock v. Pennsylvania (1943) 319 U.S. 105. For an abuse of commerce power, see e.g., United States v. Steffens (1879) 100 U.S. 82; Employers' Liability Cases (1908) 207 U.S. 463.

\(^2\) Ibid., at p. 43 (Italics supplied)

\(^3\) Ibid., at p. 37.

\(^4\) (1870) 9 Wall. 41.
certainly not as to "motive", and perhaps not even as to "purpose". The Firearms Acts of 1934 imposed an excise tax of $200 on dealers in "firearms" defined in such a way as to exclude pistols, revolvers, and guns of a type used in sports. A person was charged with violation of the Act by dealing in firearms without payment of the tax. In Sonzinsky v. United States\textsuperscript{1}, the tax was sustained, and the Court hesitated "to speculate as to the motives which moved Congress to impose it, or as to the extent to which it may operate to restrict the activities taxed\textsuperscript{2}.

An abuse of power also depends upon the attitude adopted by courts to the constitutional division of legislative powers. In Hammer v. Dagenhart\textsuperscript{3}, a question arose whether it was within the authority of Congress in regulating commerce among the States to provide for the Child Labor Act which was intended to prevent interstate commerce in the products of child labour. The Supreme Court by a majority of five to four held that the Act exceeded the constitutional authority of Congress. Justice Day, speaking

\textsuperscript{1}(1937) 300 U.S. 506.
\textsuperscript{2}Ibid., at p. 514.
\textsuperscript{3}(1918) 247 U.S. 251.
for the Court, stated various cases decided earlier and observed that in each one of them "the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended". But that element was wanting in the present case as the goods shipped were of themselves harmless. The decision was thus based on the concept of *dual sovereignty* which operated to keep the *federal balance*, i.e., interstate transportation as against local matters such as regulation of labour conditions; and our maxim in effect found its application. However, there was a shift in the Court's opinion in United States v. Darby, where a similar and almost identical


2 (1918) 247 U.S. 251, at p.271. Justice Holmes, dissenting, disagreed with the view of the majority and said: "The notion that prohibition is any less prohibition when applied to things now thought evil I do not understand. But if there is any matter upon which civilized countries have agreed, - far more unanimously than they have with regard to intoxicants and some other matters over which this country is now emotionally aroused, - it is the evil of premature and excessive child labour": ibid., at p. 280.

3 Justice Holmes thought that Congress might carry out its views of public policy whatever indirect effect they might have upon the activities of the States: ibid., at p. 281.

4 (1941) 312 U.S. 100.
problem was involved. The Fair Labor Standards Act set up a comprehensive legislative scheme for preventing the shipment in interstate commerce of certain products produced in the United States under labour conditions as respects wages and hours which failed to conform to standards set up by the Act. This time the Act was upheld. It is true that *Hammer* v. *Dagenhart* was formally overruled but it was done not because the maxim we are considering was disapproved, but because "the distinction on which the decision was rested that Congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property - a distinction which was novel when made and unsupported by any provision of the Constitution - has long since been abandoned"¹. It was the concept of dual sovereignty that had placed limitations upon federal action, but it was outmoded by the time the present case arose. "The reasoning and conclusion of the Court's opinion there", said Justice *Stone*, speaking for the Court, "cannot be reconciled with the conclusion which we have reached, that the power of Congress under the Commerce Clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution"²

Further the Constitution placed no restriction on the motives of regulating interstate commerce - these were matters for the exercise of legislative judgment and the courts were given no control over them. Congress could follow its own conception of public policy as to whether products destined for interstate commerce were injurious to public health, morals or welfare. Thus the scope of regulating interstate commerce was enlarged under the later concept of plenary powers of the Congress, and the operation of our maxim accordingly was restricted.

However, in a borderline case it is rather a question of degree depending upon an individual opinion. That is why many of these cases have strong dissents. One of such borderline cases is Railroad Retirement Board v. Alton Railroad Co. In that case the federal Railroad Retirement Pension Act of 1934, which provided for compulsory retirement and made a pension scheme applicable to interstate carriers, was held unconstitutional by a majority of five to four. The Court concluded that the social aim of the Act was too remote from the promotion and protection of inter-

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state commerce to be carried out under the guise of commerce power. "It has and can have no relation", said Justice Roberts, "to the promotion of efficiency, economy or safety by separating the unfit from the industry. If these ends demand the elimination of aged employees, their retirement from the service would suffice to accomplish the object. For these purposes the prescription of a pension for those dropped from service is wholly irrelevant". On the other hand, "The common judgment takes note of the fact", Chief Justice Hughes, speaking for the dissenters, contended, "that the retirement of workers by reason of incapacity due to advancing years is an incident of employment and that a fair consideration of their plight justifies retirement allowances as a feature of the service to which they have long been devoted". Judging the two opinions on merit, it may be said that the majority took an extremely narrow view of the commerce power (being a power not definable by reference to purpose) and implied that the power did not extend even to certain matters directly related to transportation itself. Doubts as to the validity of this opinion

1 Ibid., at p. 367.
2 Ibid., at p. 384.
3 See the penetrating criticism of the majority opinion by Powell, Commerce, Pensions and Codes (1935) 49 Harv. L. Rev. 1, 193.
have been cast in United States v. Lowden\(^1\), where Justice Stone observed that the Congressional judgment there was not without rational basis. And in Mandeville Island Farms v. American Crystal Sugar Co.\(^2\), Justice Rutledge listed Alton's Case as one "foredoomed to reversal" by Lowden's Case.

In Alton's Case, though the taxing provisions relating to the contribution made by the employers and employees to a common fund were declared unconstitutional, the spending provisions relating to the pensions to be paid out of the fund to those who were retired compulsorily were unseverable from the former. Justice Roberts said that the Act could not be re-written and given an effect altogether different from that sought by it when viewed as a whole\(^3\). Thus, if an Act deals with taxing as well as spending aspects\(^4\) of a programme for the attainment of a prohibited end, the whole of the Act would be declared invalid.

1. (1939) 308 U.S. 225, at pp. 239, 240.
4. The taxing and spending powers of Congress are provided in Art. 1, Sec. 8, Cl. 1; "To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."
The inseverability of taxing and spending aspects of an Act was more specifically emphasised in *United States v. Butler*¹, which involved the constitutionality of the Agricultural Adjustment Act of 1933. There a tax was imposed on processors of farm products, the proceeds to be paid to farmers who would reduce their acreage in production, the plan being to restore farm prices to certain defined levels by decreasing the quantities produced. Here the approach of Justice Roberts, who spoke for the majority, was to treat the Act as a plan for the control and regulation of agricultural production and to examine the constitutionality of the provisions contained therein by reference to that end. "The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan"². It was, therefore, held that as the control and regulation of agricultural production was beyond the scope of congressional power, the taxing and spending aspects of the Act were but means to an unconstitutional end in violation of the Tenth Amendment³.

¹ (1936) 297 U.S. 1.
³ It provides that "The power not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
Justice Roberts first observed that the processing tax was not a tax at all; it was in reality but part of a system for the regulation of agricultural production. He then inquired as to whether the proceeds or benefits to the farmers under the plan could be justified under the spending power. He was of the view that although the spending power was not limited by other specific grants of power\(^1\), nevertheless it was qualified by the Tenth Amendment and thus could not be exercised so as to invade the reserved rights of the States. From this he concluded that in reality the benefits constituted a part of the system of agricultural production projected under the guise of appropriations for the 'general welfare'.

It was asserted by the government that whatever might be said against the validity of the plan if compulsory, it was constitutionally sound because the end was accomplished by voluntary co-operation. To this Justice Roberts replied that the design for regulation was no less real because disguised under a system of voluntary controls. The farmer had no real choice but to accept benefits and submit to regulation:

\(^1\) After examining the theories advanced by Madison and Hamilton on the scope and meaning of the spending power, Justice Roberts came to the conclusion that Hamilton's broad and liberal theory was the right one.
The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient to exert pressure on him to agree to the proposed regulation. The power to confer or withhold unlimited benefits is the power to coerce or destroy. If the cotton grower elects not to accept the benefits, he will receive less for his crops; those who receive payments will be able to undersell him. The net result will be financial ruin. . . . This is coercion by economic pressure. The asserted power of choice is illusory.\(^1\)

These observations also lead to an implication that an appropriation of money to the States on the fulfilment of certain conditions might be ruled unconstitutional on the ground that they amounted to coercion of the States, otherwise the taxing and spending power "would become the instrument for total subversion of the governmental powers reserved to the individual States".\(^2\) However, the concept of a condition is itself a vague one which may vary from control over the expenditure so that the money may be spent for the purpose for which it was designed,\(^3\) to complete surrenders of the constitutional powers of the State or even its essential governmental functions.\(^4\)

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1. Ibid., at p. 71.
2. Ibid., at p. 75.
3. See the dissenting opinion of Justice Stone, ibid., at pp. 85, 86.
Even if the plan were one for voluntary co-operation, it would still be not constitutional as Congress, Justice Roberts ruled, could not use moneys raised by taxation to 'purchase compliance' with federal funds, submission to federal regulations of matters of state concern with respect to which Congress has no authority to interfere. "Congress has no power to enforce its commands on the farmer to the ends sought by the Agricultural Adjustment Act. It must follow that it may not indirectly accomplish those ends by taxing and spending to purchase compliance. The Constitution and the entire plan of our government negative any such use of the power to tax and to spend as the act undertakes to authorise". Justice Roberts was here trying to preserve the doctrine of 'dual federalism', and his attempt involved not only the use of the principle under discussion, but also by implication a narrow construction of the federal spending power.

The ground of invalidity of this processing tax is in contrast with the ground of invalidity of the child labour

1 *Ibid.*, at p. 74. On the other hand Justice Stone in his dissent, refused to read any such limitation on the spending power; he was of the view that Congress could relieve, when spending the money for the 'general welfare', a nation-wide economic maladjustment by conditional gifts of money: *ibid.*, at p. 86.

tax in Bailey v. Drexel Furniture Co.\(^1\). The purpose or end of the child labour tax was to restrict or prohibit the employment of children of a certain age, and thus the tax was in reality not a tax but a penalty imposed upon a person employing children. On the other hand, the processing tax was not prohibitory or even regulatory in the sense of a penalty; it was raised as revenue the proceeds of which were to be used for the control and regulation of agricultural production. Thus the question here raised was whether the money raised by taxes could be used for the accomplishment of a legislative end which fell within the reserved power of the States.

The scope of the Butler Case doctrine, however, has been greatly weakened by subsequent decisions\(^2\). The leading case is Steward Machine Co. v. Davis\(^3\) in which the Supreme

\(^1\) (1922) 259 U.S. 20.

\(^2\) Steward Machine Co. v. Davis (1937) 301 U.S. 548; Helvering v. Davis (1937) 301 U.S. 619; Carmichael v. Southern Coal & Coke Co. (1937) 301 U.S. 495; see also Cleveland v. United States (1945) 323 U.S. 329. Moreover the control and regulation of agricultural production, which the Butler Case, supra, would not allow to be achieved under the taxing and spending power, has now been fully accomplished under the commerce power: see Mulford v. Smith (1939) 307 U.S. 38; Wickard v. Filburn (1942) 317 U.S. 111.

\(^3\) (1937) 301 U.S. 548.
Court upheld the unemployment insurance scheme of the Social Security Act of 1935. Under Title IX of the Act, an excise tax was levied upon all employers of eight persons or more. The proceeds when collected were to go into the general fund of the Treasury of the United States. But a taxpayer was granted a credit up to ninety per cent. of the tax for any contributions he might have made to a State unemployment fund under a State law provided the State law satisfied certain minimum criteria imposed by the federal government. Under Title III of the Act certain sums were authorised to be appropriated for the purpose of assisting the States in the administration of their unemployment compensation laws. A corporation in the State of Alabama, which passed such an Act establishing an unemployment insurance fund, paid the tax and then filed a claim for its refund on the ground that the federal Act was invalid. One of the grounds on which the assailant relied was that an ulterior aim was wrought into the very structure of the Act and the aim was not only ulterior but unlawful as invading the reserved rights of the States. It was argued that the tax and credit in combination were 'weapons of coercion destroying or impairing the autonomy of the States'.

One noticeable feature in the opinion of Justice Cardozo, who spoke for the majority, from the Butler Case,
was that the expression "general welfare" was given a fairly wide and liberal meaning for purposes of appropriation so that any amount spent for the general national welfare would be constitutionally justified under the spending power. He, therefore, first looked into the facts as to the problem of unemployment, and then inquired whether they had assumed an area and dimension so as to warrant any help from the nation if the people were not to starve. If it was so, as he thought it was, then unemployment was a legitimate end for the promotion of "general welfare".

As to the argument of coercion "under the whip of economic pressure" it was explained that the Act was not a coercive measure but a legitimate attempt to solve the problem of unemployment - a lawful end - through the cooperation of the State and Federal governments. Unlike

1 See also Helvering v. Davis (1937) 301 U.S. 619, at p. 641, per Justice Cardozo: "Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation. What is critical or urgent changes with the time."

2 (1937) 301 U.S. 548, at pp. 586, 587.

3 They were hesitant to deal with the problem separately because of the peculiar circumstances prevailing at that time: see ibid., at p. 588. See also Helvering v. Davis (1937) 301 U.S. 619, at p. 639.
Butler Case where payments offered to a farmer were held to be coupled to contracts oppressive in character because the farmer had no choice but to accept the offer, an employer under the unemployment insurance scheme was under no such restraint or coercion because an option to contribute a certain amount to the State unemployment fund and credit it to the extent of ninety per cent. against the tax to be paid under the Act placed no extra financial burden on him. He would have incurred in either case substantially the same liability, and certainly not greater than those in States which had no such system. In the same way there was no coercion of the States. A refund of ninety per cent. of the tax to the credit of employers in the State employment fund was a very strong temptation for the States to establish an unemployment insurance scheme, but the scheme had had the approval of the State concerned and could not be a law without it; moreover, the condition of the credit was not linked to an irrevocable agreement, for the State at its pleasure might repeal its unemployment law, terminate the credit, and place itself where it was before the credit was accepted. "Who then is coerced through the operation of this statute?" asked Justice Cardozo, "Not the taxpayer, He pays in fulfilment of the mandate of the local legislature. Not the state. Even now she does not offer a
suggestion that in passing the unemployment law she was affected by duress. See *Carmichael v. Southern Coal and Coke Co.*\(^1\) and *Carmichael v. Gulf State Paper Corp.*\(^2\). For all that appears she is satisfied with her choice and would be sorely disappointed if it were now to be annulled\(^3\).

The fallacy in the petitioner's contention was seen in the fact that "it confuses motive with coercion. Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed. Sonzinsky v. United States\(^4\). In like manner every rebate from a tax when conditional upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophic determinism by which choice becomes impossible\(^5\).

In an earlier case, *Massachusetts v. Mellon*\(^6\), an

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\(^1\)(1937) 301 U.S. 495.
\(^2\)(1937) 301 U.S. 495.
\(^3\)(1937) 301 U.S. 548, at p. 589.
\(^4\)(1937) 300 U.S. 506.
\(^5\)(1937) 301 U.S. 548, at pp. 589, 590.
attempt was made to seek an injunction against carrying out the Maternity Act of 1921, which provided for federal grants to the States on condition that such States would comply with the provisions of the Act and use the aids for maternal and child health and welfare services. It was asserted that the Act constituted an effective means of inducing the States to yield a portion of their sovereign rights. Though the suit was dismissed on the procedural ground that neither the State nor the taxpayer had any standing to challenge the constitutionality of the Act, it was apparent in the opinion of Justice Sutherland that the condition of the grant raised no constitutional issue as "the powers of the State are not invaded, since the statute imposes no obligation but simply extends an option which the State is free to accept or reject".  

But then where to draw a line between temptation and coercion? "It is one thing", explained Justice Cardozo, "to impose a tax dependent upon the conduct of the taxpayers, or of the State in which they live, where the conduct to be stimulated or discouraged is unrelated to the fiscal heed subserved by the tax in its normal operation, or to any other end legitimately national. The Child Labor Tax Case,  

1 (1923) 262 U.S. 447, at p. 480. 
and *Hill v. Wallace* ¹, were decided in the belief that the statutes there condemned were exposed to that reproach. Cf. *United States v. Constantine* ². It is quite another thing to say that a tax will be abated upon the doing of an act that will satisfy the fiscal need, the tax and the alternative being approximate equivalents. In such circumstances, if in no others, inducement or persuasion does not go beyond the bounds of power."³. In the present case it was not coercion because the credit allowed for the State funds was not unrelated to the fiscal need subserved by the tax in its normal operation since the purpose of Congress intervention was to safeguard its own treasury and therefore to let the States share the burden upon equal terms. However, "the location of the point at which pressure turns into compulsion and ceases to be inducement, would be a question of degree, - at times, perhaps, of fact,"⁴ and the Court hesitated to lay down any test as to the validity of a tax "if it is laid upon the condition that a state may escape its operation through the adoption of a statute unrelated in subject matter to activities fairly within the scope of

¹ (1922) 259 U.S. 44.
² (1935) 296 U.S. 287.
³ (1937) 301 U.S. 548, at p. 591.
⁴ Ibid., at p. 590.
national policy and power". But the tendency is to support such a scheme unless it is manifestly unjust or patently outside the Congressional power. "The discretion, however", remarked Justice Cardozo, "is not confided to the Courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment".

But suppose taxing and spending aspects of a federal Act are severed from one another and they are provided in two separate Acts, though still constituting parts of a plan for the attainment of a prohibited end, i.e., regulation of a subject matter within the States reserved jurisdiction. Would the Acts stand a better chance than before so far as federal power is concerned? Following Massachusetts v. Mellon, and the way that case was distinguished in the Butler Case, Congress attempted to put the Railroad

1 Ibid., at p. 590.
3 (1923) 262 U.S. 447; a person has no standing to challenge the expenditure of money that is made from the general fund of the Treasury.
4 (1936) 297 U.S. 1. Massachusetts v. Mellon, supra, was distinguished on the ground that there the taxpayer's money was part of the general fund of the Treasury, whereas here the tax levied on processors of agricultural products was all part of one Act and it was a definable unit which had no revenue purpose apart from the programme envisaged in the Act.
Retirement Act\(^1\) beyond the scope of judicial review by severing the taxing and spending aspects of the retirement programme; one Act provided for the levying of an excise tax on employers and employees and making the tax payable into the general fund of the Treasury, and the other Act, separate but parallel, providing for the creation of a fund from which pensions could be paid along the lines of the original scheme\(^2\). This scheme has never been tested in the courts. On the other hand, its constitutionality appears to have been taken for granted in Railroad Retirement Board v. Duquesne Warehouse Co.\(^3\)

However, though Congress has almost complete control over appropriations, it does not mean that a measure's constitutionality is not justiciable. Any attempt by Congress under the guise of an appropriation Act to do what is prohibited under the Constitution would be declared invalid by the Courts. In United States v. Lovett\(^4\), the issue was

\(^1\) The one held invalid in Railroad Retirement Board v. Alton Railroad Co., supra.


\(^3\) (1946) 326 U.S. 446. A similar scheme consisting of two separate Acts, one imposing a tax on carriers and the other authorising appropriations from the general funds in the Treasury for retirement benefits for railroad employees, was sustained in California v. Anglim (9th Cir. 1942) 129 F. 2d 455, Cert. denied, (1942) 317 U.S. 669.

\(^4\) (1946) 328 U.S. 303.
the validity of s.304 of the Urgent Deficiency Appropriation Act of 1943 under which Congress had enacted that no salary or compensation should be paid to certain named employees of the Government out of the monies then or thereafter appropriated, except for certain named services. The Supreme Court held the section to be invalid as being in effect a Bill of Attainder or ex post facto law as it was shown by the section's language as well as the circumstance of its passage that no mere question of compensation procedure or of appropriations was involved. Justice Black said:

Section 304, thus, clearly accomplishes the punishment of named individuals without a judicial trial. The fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals found guilty of disloyalty, makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal. No one would think that Congress could have passed a valid law, stating that after investigation it had found Lovett, Dodd, and Watson *guilty* of the crime of engaging in *subversive activities*; defined that term for the first time, and sentenced them to perpetual exclusion from any government employment. Section 304, while it does not use that language, accomplishes that result. The effect was to inflict punishment without the safeguards of a judicial trial and determined by no previous law or fixed rule.\(^2\)

Conditional grants pose another problem when examined

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1. Art I, sec. 9 of the Constitution prohibits passage of bills of attainder by Congress.
2. Ibid., at pp. 316, 317.
in relation to individual freedoms guaranteed by the Constitution. Conditions attached to a grant might impinge upon the individual freedoms but they must be substantially related to the purpose of the facilities sought to be provided. "The normal desire to enjoy these 'privileges', like the desire to use public streets and parks, cannot be made an instrument of suppression unless in the context of the statute in question the suppression is adjudged to serve a legitimate public interest of such gravity as to warrant it".

In *Oklahoma v. United States Civil Service Commission* a question arose as to the validity of certain provisions of the Hatch Act of 1940, which apart from prohibiting political activities by State employees, further prohibited political activities by State employees whose principal employment related to any activity financed in whole or in

1 Willcox, *Invasions of the First Amendment through Conditioned Public Spending* (1955) 41 Cornell L.J. 12, at p. 44. See also *Notes - Unconstitutional Conditions* (1960) 73 Harv. L. Rev. 1595, at pp. 1599-1602.


3 These provisions of the Hatch Act were sustained in *United Public Workers v. Mitchell* (1947) 330 U.S. 75; it was recognised that the restriction operated to some extent to infringe upon First Amendment privileges, but the Supreme Court upheld the statute as a proper exercise of the authority of Congress over the discipline and efficiency of the public service.
part by federal loans or grants. The sanction consisted in the withdrawal from the State of an amount equal to two years' salary of the offending employee. The Supreme Court first found that the authorisation in the statute of judicial review of a decision withdrawing benefits gave jurisdiction to determine the validity of the statute as well as getting over any difficulty under the Massachusetts v. Mellon doctrine. But the Court dismissed the suit on the ground that the end sought by Congress through the Hatch Act was better public service by requiring those who administer funds for national needs to abstain from political partisanship. The use of concepts like "better public service" brings into play considerations which involve a hierarchy of values serving as guides between alternatives.

In Adler v. Board of Education, the Supreme Court sustained a New York statute, the so-called Feinberg Law, which prohibited the employment of any person who advocated the overthrow of the government by unlawful means, or who was a member of an organisation which had a like purpose. The Feinberg Law directed the New York Board of Regents to make a listing, after notice and hearing, of organisations

\[\text{(1952) 342 U.S. 485.}\]
of the type described. Under the statute the Regent provided by regulation that membership in a listed organisation should be "prima facie evidence of disqualification" for employment in the school system. But substantial procedural protections were afforded both to individuals and organisations. Justice Minton, who spoke for the majority, upholding the legislation, said that the presumption arising from proof of membership in a listed organisation was not unreasonable or arbitrary so as to be a denial of due process of law because it was a legislative finding that the member by his membership supported the ideology the organisation stood for, and the Court could not say that such a finding was contrary to fact or that "generality of experience" pointed to a different conclusion. As to the argument that the statute constituted an abridgment of the freedom of speech and assembly, he said: "It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. American Communication Association v. Douds\(^1\). It is equally clear that they have no right to work for the State in the school system on their own terms. United Public Workers v. Mitchell\(^2\). They may work for the school system upon the reasonable terms laid (1950) 339 U.S. 382. See also Osman v. Douds (1950) 339 U.S. 846. (1947) 330 U.S. 75.
down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech and assembly? We think not. However, the decision as to the reasonability of the terms or conditions lies ultimately with the courts. "When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech", Chief Justice Vinson said in Doud's Case; "the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented."

Thus in order to determine whether there has been an invasion of individual freedoms, it is not sufficient to show that conditions attached to a grant are related to the purpose of the scheme; it has further to be examined whether they are unreasonable, arbitrary or discriminatory. For

1. (1952) 342 U.S. 485, at p. 492. In McAuliffe v. New Bedford (1892) 155 Mass. 216, 29 N.E. 517, it was said that "the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman"; cf. Douglas and Black, dissenting in Barsky v. Board of Regents (1954) 347 U.S. 442, at p. 472.


3. Ibid., at p. 399.
example, in *Wieman v. Updegraff*\(^1\) it was held that the requirement that a public official must take an oath of non-membership in subversive organisations violated due process if knowledge of the organisation's character was not required. "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power"\(^2\).

\(^1\) (1952) 344 U.S. 183.

CHAPTER III

Canada

The division of legislative powers between Dominion Parliament and Provincial legislatures in Canada is affected by sections 91-95 and by other sections of the British North America Act, 1867; but the main provisions are sections 91 and 92 and the problems of ultra vires have arisen mostly in the meaning and effect of those sections.

S.91 authorises the Dominion Parliament to make laws for the peace, order and good government of Canada in relation to all matters not coming within the sixteen classes of subjects assigned exclusively to the Provincial legislatures. And for greater certainty, but not so as to restrict the generality of the foregoing, it is declared that notwithstanding anything in the Act (i.e., notwithstanding s.92), the exclusive legislative authority of the Dominion Parliament extends to all matters coming within the twenty-nine classes of subjects enumerated in s.91. The last head of s.91 further provides that any matter

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1 Originally there were twenty-nine enumerations; two more have been added by amendment.
coming within the twenty-nine classes of subjects enumerated in s.91 shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects assigned exclusively to the Provincial legislatures by s.92. S.92 gives the Provincial legislatures exclusive power to legislate on matters coming within the sixteen heads enumerated therein of which the last one is generally all matters of a merely local or private nature in the Province.

The peace, order and good government clause in s.91 was originally intended to be the major source of power of the Dominion Parliament with enumerated heads being merely illustrations of the general power. But through judicial interpretation the order was reversed relegating the general power to the role of supplement to the enumerated powers which became of major consequence. This led to a rule of construction which accorded Dominion legislation under the enumerated heads primacy over the Provincial powers enumerated in s.92, but denied this primacy to the general clause.

1 See Kennedy, The Interpretation of the British North America Act (1942) 8 Camb.L.J. 146, at p. 150.
Thus the scope of the general power was considerably narrowed down by reference to the enumerated heads of Provincial power under s.92, particularly to the *property and civil rights* clause, except during periods of emergency such as war, pestilence and famine.

The Dominion power of *regulation of trade and commerce* under head (2) of s.91, a power which has immense potentialities and in fact proved to be a fruitful source of federal legislative authority in the United States, has been given a restricted meaning so as to render it almost useless except for the regulation of external and

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interprovincial trade, and for the creation of national trade marks. It was pointed out by the Judicial Committee that the "regulation of trade and commerce" clause, if given unrestricted interpretation, would appear to be sufficient to give Dominion Parliament a complete control over the economic life of the country, so that many of the enumerations in s. 91 would be regarded as meaningless, and the degree of autonomy, which the provinces were intended to possess, would be seriously curtailed, if not virtually extinguished. However, the clause could be applied in aid of some other independent power under s. 91 which might with its assistance be interpreted to prevail over the provincial power of property and civil rights.

The last paragraph of s. 91 has also been interpreted to include and correctly describe all the matters enumerated in s. 92, as being, from a provincial point of view, of a

3 Citizens' Insurance Co. v. Parsons, supra, at pp. 112, 113.
4 Canadian Federation of Agriculture v. Attorney-General for Quebec, supra, at p. 195.
5 In re Board of Commerce Act, supra, at p. 198. Toronto Electric Commissioners v. Snider, supra, at pp. 409, 410.
local and private nature\textsuperscript{1}, whereas in its grammatical construction it appears to apply only to head 16 of s.92\textsuperscript{2} which provides for a law in relation to "generally all matters of a merely local or private nature in the provinces". This interpretation also led to the denial of paramountcy of Dominion legislation, except when enacted in relation to an enumerated head under s.91 or when ancillary to legislation so enacted.

The Dominion was thus handicapped in endeavouring to tackle the multifarious problems of a modern state\textsuperscript{3}. It was, therefore, forced to seek some other power to serve its purpose. To a certain extent it did succeed in discouraging economic malpractices by using its power in relation to criminal law under head 27 of s.91. For example, s.498A of the Canadian Criminal Code prohibited certain kinds of trade combinations, and provided for penal sanctions in cases of breach. In Attorney-General for British Columbia v. Attorney-General for Canada\textsuperscript{4}, the Privy Council held that this section was valid, despite the fact that it dealt with a matter of a merely local or private nature.

\textsuperscript{1} See e.g., Attorney-General for Ontario v. Attorney-General for Canada [1896] A.C. 348, at p. 359; Great West Saddlery Co. v. The King [1921] 2 A.C. 91, at pp. 99, 100.

\textsuperscript{2} See e.g., Citizens Insurance Co. v. Parsons, supra, at p. 108.

\textsuperscript{3} See Wheare, Federal Government (2nd ed.), at pp. 137-140; The Report of the Royal Commission on Dominion Provincial Relations, Book I, at p. 250.

\textsuperscript{4} [1937] A.C. 368.
Council held that the section was in toto intra vires of the Dominion power. The basis of the decision was that there seemed to be nothing to prevent the Dominion, if it thought fit in the public interest, from applying the criminal law generally to acts or omissions which so far were only covered by provincial enactments. "The only limitation on the plenary power of the Dominion to determine what shall or shall not be criminal" said their Lordships, "is the condition that Parliament shall not in the guise of enacting criminal legislation in truth and in substance encroach on any of the classes of subjects enumerated in s.92"\(^1\). It was no objection that it did in fact affect them, for it was a genuine attempt to amend the criminal law and it might obviously affect previously existing civil rights. In some cases it also succeeded in exploiting the negative character of provincial powers. For example, by declaring grain elevators to be works \(\text{for the general advantage of Canada}\) under head 10 of s.92, it has been able to exercise jurisdiction over the grain trade\(^2\).

\(^1\) Ibid, at p. 375.

\(^2\) King v. Eastern Terminal Elevator Co. (1925) S.C.R. 434, at p.448; there was no appeal to the Privy Council against the decision of the Supreme Court. For a general discussion of the power of the Dominion to declare works \(\text{for the general advantage of Canada}\), see Gouin and Claxton, Legislative Expedients and Devices adopted by the Dominion and the Provinces, Chapter IV.
The general scheme of the division of legislative powers as provided in ss.91 and 92 clearly indicate that the specific powers of Dominion and provinces are mutually exclusive and in case of conflict pre-eminence is to be given to the Dominion. Still with regard to certain classes of subjects generally described in s.91, legislative power may reside as to some matters falling within the general description of these subjects in the legislatures of the provinces. In order to prevent such a conflict "the two sections must be read together, and the language of one interpreted and, where necessary, modified by that of the other". However, there may be cases where the Dominion as well as the provinces may legislate with respect to the same subject matter and still act within their respective powers. For example, in Brewers and Maltsters Association v. Attorney-General for Ontario, it was held that the provincial legislatures might validly require brewers, and distillers, though duly licensed by the Dominion Government, to take out and pay for provincial licenses.


But a situation may arise where a law enacted by the Dominion or a province may under the guise, or the pretence, or in the form of an exercise of its own powers deal with a subject matter which is beyond its powers, and have the actual effect of trespassing on the exclusive power of the other. In such a case it may be necessary to determine the true nature and character of the legislation and examine with some strictness its substance for the purpose of determining what it is the legislature is really doing. For example, in the Canadian Federation Case, the prohibition, import or sale of margarine as provided in s.5(a) of the Dairy Industry Act of 1927, was in question. The Act was sought to be justified as a law within the subject of criminal law because its breach was punishable, and such breach was tried by criminal procedures. The Judicial Committee, however, took the view that

the prohibition was in pith and substance a law for the protection and encouragement of the dairy industry in Canada, and the fact that, incidentally, penalties were provided for any breach of the prohibition, was not sufficient per se to make the prohibition a law in relation to criminal law so as to fall within the exclusive legislative competence of the Dominion Parliament. The prohibition, it was observed, in fact related to *civil rights* within each of the provinces. The law was, therefore, held invalid. Similarly, when British Columbia prohibited the employment of Chinamen of full age in underground coal workings, it was held in *Union Colliery Co. of British Columbia v. Bryden*\(^1\) that the law was ultra vires the provincial legislature. Regarded merely as a coal-working regulation, it would come within the provincial domain of *"Local Works and Undertaking"* and *"Property and Civil Rights"*. But its exclusive application to Chinamen, who were aliens or naturalised subjects, established a statutory prohibition which was within the exclusive authority of the Dominion Parliament in regard to *naturalization and aliens*, in the guise of regulating labour in coal mines.

There are certain matters which are not expressly mentioned in s.91 and s.92, and which may not be wholly within the jurisdiction of either the Dominion Parliament or provincial legislatures, but "which in one aspect and for one purpose fall within s.92, may in another aspect and for another purpose fall within s.91". Laws regulating liquor traffic and trade combinations provide outstanding examples of a subject-matter attracting the doctrine of "double aspect". The jurisdiction over matters of this type has to be examined "with reference to the actual facts if it is to be possible to determine under which set of powers it falls in substance and in reality". While dealing with these matters it is likely that a law may ostensibly be within the jurisdiction of the enacting body, but in substance and reality it may be found to be a

1 Hodge v. Queen [1883] 9 A.C. 117, at p. 130.
2 See Russel v. Queen [1882] 7 A.C. 829; Hodge v. Queen, supra.
3 See In re Board of Commerce Act, supra; Proprietary Articles Trade Association v. Attorney-General for Canada [1931] A.C. 310.
4 Other examples of such matters are provided by insurance, labour disputes and marketing of natural products.
colourable legislation dealing with an aspect of the matter which falls within the jurisdiction of some other enacting body. Insurance provides a striking example. Several attempts have been made by the Dominion Parliament to regulate insurance as an exercise of power conferred by one or more heads of s.91, but all of them were disapproved by the Judicial Committee as being colourable legislation which encroached upon the power with respect to ‘property and civil rights’ in the provinces. For example, in the Second Insurance Reference Case, the question was whether a foreign or British insurer already licensed under the Quebec Insurance Act to carry on business within the province, could do so without being also licensed under the Insurance Act of Canada. The Act was sought to be justified as being within the Dominion’s power to legislate


with respect to aliens and immigration. It was held that the Dominion Parliament could not, under the guise of legislating as to aliens, seek to intermeddle with the conduct of insurance business which was exclusively subject to provincial law. In the First Insurance Reference Case, it had already been decided that it was not competent to the Dominion to regulate generally the business of insurance in such a way as to interfere with the exercise of civil rights in the provinces.

Yet it is interesting to note that in the First Insurance Reference Case, in reply to a question whether the Dominion Parliament had jurisdiction to require a foreign company to take out a license from the Dominion minister, even in a case when the company desires to carry on its business within the limits of a single province, Lord Haldane, speaking on behalf of the Privy Council, said that "in such a case it would be within the power of the Parliament of Canada, by properly framed legislation, to impose such a restriction. It appears to them that such a power is given by the heads of s.91 which refer to the regulation of trade and commerce and to aliens." However,

the Dominion has not yet succeeded in establishing a measure of control over insurance by "properly framed legislation".

Another example of colourable legislation is provided by *Lethbridge Northern Irrigation District v. I.O.F.* 2, in which a provincial law under the guise of dealing with the subject matter of 'securities' dealt with an aspect of the matter which fell within the jurisdiction of the Dominion. The Provincial Guaranteed Securities Interest Act, and the Provincial Securities Interest Act, being parts of the Statutes of Alberta of 1937, purported to reduce the interest payable on certain securities guaranteed or issued by the province. The Judicial Committee declared the Acts *ultra vires* on the ground that they were in pith and substance dealing with 'interest' within the meaning of head 19 of s.91.

Even though the powers conferred on the Dominion Parliament and the provincial legislatures are enumerated in s.91 and s.92 respectively, a sharp and definite distinction between the classes of subjects in the two

1 Refer to the recommendation on insurance jurisdiction made by the *Royal Commission on Dominion-Provincial Relations* (1940) Book II, at pp. 59-62.

lists could not be attained. Some of the classes of one list unavoidably run into the classes of subjects of the other. Such a conflict arising from the overlapping of classes of subjects in ss. 91 and 92 was not intended by the framers of the constitution, otherwise the powers exclusively assigned to the provincial legislatures would be absorbed in those given to the Dominion Parliament. Thus "in order to prevent such a result the two sections must be read together, and the language of one interpreted, and where necessary modified, by that of the other". At the same time, courts have been careful to see that under the guise of acting within its powers the Dominion Parliament or a provincial legislature may not trench upon the jurisdiction of the other. In Madden v. Nelson and Fort Sheppard Ry. Co., which provided a provincial Cattle Protection Act that a Dominion railway company shall be responsible for cattle injured or killed on the railway, unless it erects proper fences on its railway, was held to

1 Citizens' Insurance Co. v. Parsons, supra, at p. 109; see also Russel v. Queen, supra, at p. 836. Cf. Laskin, Canadian Constitutional Law (1951), at p. 43.

be ultra vires. In reality it imposed a liability upon the railway company to create such and such works upon its roadway, and so was manifestly beyond the jurisdiction of the provincial legislature, because such controls came within the exclusive Dominion power. "Their Lordships are not disposed to yield to the suggestion, even if it were true to say that the statute was only an indirect mode of causing the construction to be made, because it is a very familiar principle that you cannot do indirectly, what you are prohibited from doing directly."  

Under the *peace, order, and good government* clause of s.92, the Dominion Parliament has the exclusive power with reference to the incorporation of companies with other than provincial objects, for the matter is one not coming within the classes of subjects assigned exclusively to provincial legislatures, particularly the class of subjects forming head 11 of s.92, the incorporation of companies with provincial objects. Here the power of Dominion and provinces as to the incorporation of companies clearly overlap, and in a number of cases the question

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1 Ibid., at pp. 627, 628.
arose as to what extent provincial laws applied in the case of Dominion companies. For example, in *Great West Saddlery Co. v. The King*¹, the question was whether several Dominion companies could be restrained from carrying on their business in the province unless they had complied with the requirements (that they be registered or licensed) of the respective Companies Acts of the provinces of Saskatchewan, Manitoba, and Ontario. The view adopted by the Judicial Committee was that a Dominion company might be subject to provincial laws of general application such as laws imposing taxes, or relating to mortmain, or even requiring licenses for certain purposes, or as to the form of contracts, but a provincial legislature could not validly enact for the enforcement of such laws sanctions if applied would sterilise or destroy the capacities and powers which the Dominion has validly conferred. "Within the spheres allotted to them by the Act", their Lordships observed, "the Dominion and the Provinces are rendered on general principle co-ordinate Governments. As a consequence, where one has legislative power the other has not, speaking broadly, the capacity to pass laws which will interfere with its exercise. What cannot be done directly

¹[1921] 2 A.C. 91.
cannot be done indirectly"\textsuperscript{1}. Hence the Acts, excepting the provisions relating to mortmain which were severable, were held to be \textit{ultra vires}.

Another example of an apparently conflict is to be found in the taxing powers of the Dominion and the provinces under head 3 of s.91, \textit{the raising of money by any mode or system of taxation}\textsuperscript{1}, and under head 2 of s.92\textsuperscript{2}, \textit{direct taxation within the province in order to the raising of a revenue for provincial purposes}\textsuperscript{1}, respectively. The conflict is due to overlapping in the field of direct taxation but "each power is the necessary adjunct of mutually independent government", and these powers deemed to involve no direct conflict. "They are two independent powers springing from the same source which do not interfere with each other. The power granted to the Dominion is broad and inclusive of any and every sort of taxation, while the power of taxation given to the provinces is definitely limited in kind and area"\textsuperscript{3}. Further the taxing powers of

\textsuperscript{1}Ibid., at p. 100. See also Attorney-General for Manitoba v. Attorney-General for Canada [1929] A.C. 260; it was held that a provincial Act could not prohibit a Dominion company from selling its shares in the province.

\textsuperscript{2}Refer also to head 9 of s.92, \textit{shop, saloon, tavern, auctioneer and other licenses}\textsuperscript{1}, but its scope is not entirely certain: Kennedy and Wells, \textit{The Law of the Taxing Power in Canada} (1931) Chapters V and VI.

\textsuperscript{3}Kennedy and Wells, \textit{loc. cit.}, at p. 15.
the Dominion and the provinces are defined by reference to purpose. Thus an Act imposing a tax would be regarded as invalid "if the tax as imposed is linked up with an object which is illegal". For example, the Second Insurance Reference Case involved the validity of s.16 of the Special War Revenue Act of Canada, which imposed upon every resident in Canada a tax in respect of the cost of insuring any property in Canada with any British or foreign insurer not licensed by the Dominion. The Privy Council rejected the contention of the Dominion seeking to justify this provision as relating to matters covered by taxation under head 3 of s.91, and held it to be ultra vires. In the guise of legislation imposing Dominion taxation, it in reality dealt with a subject-matter which was within the exclusive authority of the provinces. "S.16 clearly assumes", their Lordships observed, "that a Dominion license to prosecute insurance business is a valid license all over Canada and carries with it the right to transact insurance business. But it has been already decided that this is not so ... It is really the same old attempt in another way."

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1 Ibid., at p. 17.
2 Ibid., at p. 17.
5 Ibid., at pp. 52, 53.
In the Great West Saddlery Case, it was laid down that no provincial legislature could use its powers as an indirect means of destroying powers given legally by the Dominion Parliament. In other words, a provincial law must be justified as directed exclusively to the attainment of an object of legislation assigned by s. 92 to provincial legislatures. The taxing power is no exception to this interpretation. And it equally applies in reverse to the Dominion Parliament. "By parity of reason", observed Lord Phillimore in Caron v. The King\(^1\), "the Parliament of Canada could not exercise its powers of taxation so as to destroy the capacity of officials lawfully appointed by the province". Thus the respective taxing powers of the Dominion and the provinces may not be used by either of them so as indirectly to destroy or sterilise capacities and powers conferred by the other upon its functionaries. In Attorney-General for Alberta v. Attorney-General for Canada\(^2\), a question related to the validity of the Taxation of Banks Bill of Alberta which proposed to levy an annual tax, in addition to any tax payable under

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any other Act, on the paid-up capital and on the reserved funds of the Canadian chartered banks, other than the Bank of Canada, doing business in the province. The Judicial Committee held that on a consideration of the object of the Bill and its effect, the proposed taxation was not an effort to raise a revenue for provincial purposes but to interfere with the banking operations within the province. The Act was therefore declared *ultra vires* the Alberta legislature.

It was noted that the justification of a taxing measure did not depend upon the size of the tax, or its being discriminatory. But these facts could as well in certain circumstances amount to an abuse of the taxing power. Thus the tax may be of such magnitude as to be prohibitive or destroy the capacities and powers of Dominion institutions. Or "under the guise of discriminatory taxation in the province", added their Lordships, "it would be easy not only to impair, but even to render wholly nugatory, the exclusive legislative authority of the Dominion over a number of the classes of subjects specifically mentioned in s.91 by making them valueless".


In this case their Lordships found that firstly the rate of taxation was such that it was designed to have the effect of preventing the banks from carrying on their business\(^1\), and secondly the taxation was aimed at singling out the banks and no other corporation, body or persons in the province\(^2\).

Another consideration that moved their Lordships to reach their conclusion was based upon the fact that the Bill formed part of a general scheme of social credit legislation, the basis of which was the Social Credit Act of 1937; and the Act itself was declared invalid on other grounds by the Supreme Court\(^3\). It was noted that the Bill contained no reference to the Act, yet their Lordships agreed with Kerwin J. (concurred in by Crocket J.) that there was no escape from the conclusion that, instead of being in any true sense taxation in order to the raising

\(^1\)Ibid., at p. 132.
\(^2\)Ibid., at p. 131.

Though the validity of the Social Security Act did not come up formally before the Privy Council, their Lordships expressed an opinion that on examination there was "little doubt that the Act was an attempt to regulate and control banks and banking in the province": Attorney-General for Alberta v. Attorney-General for Canada, supra, at pp. 132, 133.
of a revenue for provincial purposes, the Bill was merely "part of a legislative plan to prevent the operation within the province of those banking institutions which have been called into existence and given the necessary powers to conduct their business by the proper authority, the Parliament of Canada"\(^1\).

However, in the case of two other Bills which also formed part of the same scheme, their Lordships refused to hear arguments as to their validity, because they could operate only if certain institutions created by and working under the Social Credit Act, were in existence. Moreover, since the order of the Supreme Court the Act was also repealed by the Alberta legislature\(^2\).

Thus in determining the validity of an Act, it may be necessary to have a look at another Act, if the latter either constitutes a legislative scheme with the former to achieve a certain purpose or forms the basis of the operation of the former.

The colourable character of an Act was also examined

\(^1\) Attorney-General for Alberta v. Attorney-General for Canada, supra, at p. 133.
\(^2\) Ibid., at pp. 127, 128.
by reference to another Act in *Attorney-General for Ontario v. Reciprocal Insurers*\(^1\). The Dominion Insurance Act empowered the minister to grant licenses to companies authorising them to carry on in Canada the business of insurance, and provided for a comprehensive system of regulations controlling licenses in relation to the form and basis of contracts of insurance. In order to make the Insurance Act effectual the Criminal Code was amended so as to make it an indictable offence to carry on such a business without a license. The question raised was whether certain companies licensed under the Ontario Insurance Act, were entitled to carry on insurance business even though rendered illegal or otherwise affected by the provisions of the Criminal Code in the absence of a license under the Dominion Insurance Act. The Privy Council held the amendment to the Criminal Code *ultra vires* since, in substance though not in form, it was in regulation of contracts of insurance, a subject not within the legislative competence of the Dominion. "These two statutes, which are complementary parts of a single legislative plan", their Lordships said, "are admittedly an attempt to produce by a different legislative procedure\(^1\)."

\(^1\)[1924] *A.C.* 328.
the results aimed at by the authors of the Insurance Act of 1910, which in Attorney-General for Canada v. Attorney-General for Alberta was pronounced ultra vires of the Dominion Parliament." Similarly in Lethbridge Northern Irrigation District v. I.O.F., it was held that the Provincial Guarantees Securities Proceedings Act of the Statutes of Alberta of 1937, which purported to prohibit any proceedings in Alberta for recovering directly or indirectly money due in respect of any guaranteed security without the consent of the Lieutenant-Governor in Council, was in fact designed to effect the same purpose as the Provincial Guaranteed Securities Interest Act (also forming part of the Statutes of Alberta of 1937), which was held to be ultra vires as dealing with interest, a subject-matter within the exclusive legislative competence of the Dominion. Therefore the Act must fall with the latter Act. It was an attempt to do by indirect means something which the Provincial parliament could not do.

As noticed earlier, the taxing power of the Dominion and the provinces is defined by reference to purpose.

1 [1916] 1 A.C. 588 (First Insurance Reference Case).
3 Ibid., at pp. 533, 539.
The provinces are empowered to impose taxes for raising a revenue for provincial purposes, and so is the Dominion for Dominion purposes. It means that the spending power of the Dominion and the provinces is implied in their respective taxing powers. S.106 further provides that the Consolidated Revenue Fund shall be appropriated by the Dominion parliament for the public service.

Since 1913 grants-in-aid have been made by the Dominion to the provinces for some specific purpose such as public health, highways, technical education, old-age pensions and unemployment relief\(^1\). These grants were designed to help the needy provinces, but each province had to comply with certain conditions which might touch on a matter of provincial concern. Such devices raise some doubts as to the validity of the exercises of Dominion legislative authority\(^2\). But they have never been challenged in the courts and the position is uncertain.

However, in Canada on the whole the Courts have frustrated legislative schemes to provide some flexibility modifying

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1 For a general discussion of the Dominion-provincial financial relations see Dawson, *The Government of Canada* (2nd ed.), Chapter VI.

2 See Gouin and Claxton, *Legislative Expedients and Devices adopted by the Dominion and the Provinces*, Chapter III.
the rigid compartmentalisation of the Dominion and provincial legislative powers.

In *Attorney-General for Canada v. Attorney-General for Ontario*, Lord Atkin said that it is true that the Dominion may impose taxation for the purpose of creating a fund for special purposes and apply that fund for making contributions in the public interest, "but assuming that the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within the Dominion competence. It may still be legislation affecting the classes of subjects enumerated in s.92, and if so, would be *ultra vires*". In that case the question related to the validity of the Employment and Social Insurance Act of 1935, in which an attempt was made to pay direct benefits to the citizens under a scheme of unemployment insurance financed partly from the money provided by the Dominion government, and partly from the contributions made by employers and workers. The Judicial Committee held that the Act was *ultra vires* of the Dominion parliament, as in its pith and substance

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1 See Birch, *Federalism, Finance and Social Legislation* (1955) Chapter III.
3 Ibid., at pp. 366, 367.
it was an insurance Act affecting the civil rights of the employers and workers in each province.

One of the arguments put forward in support of the legislation was that the obligation imposed upon the employers and workers was a mode of taxation under head 3 of s.91, and the money so raised became public property with the result that the Dominion had complete legislative authority to apply it towards the establishment of the insurance scheme. Lord Atkin replied to this by saying that even in such a case a law might be so framed as to invade "property and civil rights" within the province. "If on the true view of the legislation it is found", his Lordship said, "that in reality in pith and substance the legislation invades civil rights within the province, or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid. To hold otherwise would afford the Dominion an easy passage into the provincial domain".

To overcome difficulties arising due to the rigid distribution of legislative powers, an attempt by enabling the delegation of power by a province to the Dominion and vice versa, was made. Such a device would have to a

1 Ibid., at p. 367.
considerable extent given the Constitution flexibility to cope with the needs of changing times. Till recently its constitutionality was somewhat uncertain\(^1\). But in Attorney-General for Nova Scotia v. Attorney-General for Canada\(^2\), the Supreme Court held that interdelegation between Dominion and provinces was unconstitutional mainly on two grounds; firstly it would disturb the settled line of demarcation between the legislation powers of Dominion and provinces indicated by the use of the word "exclusive-ly" in s.92, and secondly it would override the constitutional equality between Dominion and provinces as both possess equal sovereignty within their respective fields.

However, a delegation of executive or administrative power, including even rule-making, to a single board appointed by both Dominion and province, has been held constitutionally permissible\(^3\). It has been found workable

\(^1\) See Corry, Difficulties of Divided Jurisdiction, Appendix No. 7.


in those cases where a subject-matter by its nature is shared between the competence of Dominion and province, so that acting singly neither could have effective or adequate regulation of the subject-matter. Schemes for marketing or regulation of trade in certain commodities provide an illustration in this context. These schemes are local in so far as they involve buying or selling or similar operations within a province, but as soon as their operation goes beyond the territorial limits of a province they become inter-provincial. In such cases the only effective means open, apart from conditional legislation, is that of co-operative action taking the form of a single board to administer regulations referred by both Dominion and province on agreed measures. The constitutionality of such schemes was tested in Potato Marketing Board v. Willis and Attorney-General for Canada¹. Under the provincial law of Prince Edward Island, the Lieutenant-Governor in Council was empowered to establish schemes to regulate transportation, packing storage and marketing of natural products, and to set up marketing boards to administer the scheme and to vest in the boards all necessary powers to enable them to carry out their functions. The boards were also given

¹ [1952] 4 D.L.R. 146.
the power, on the approval of the Lieutenant-Governor in Council, to perform any function or duty and to exercise any power imposed or conferred upon it by the Dominion. The Dominion counterpart of the scheme was a law which provided that the Governor-General in Council may delegate the Dominion's jurisdiction over interprovincial and external aspects of trade in natural products to any board or agency authorised under the law of any province. Both the Lieutenant-Governor in Council and Governor-General in Council acted accordingly, the former in constituting a board and the latter in granting to it the Dominion's jurisdiction. The Supreme Court held that the delegation by the Governor-General in Council to the provincial board was intra vires, as the board was a legal entity separate and distinct from the provincial legislature, and a delegation to it did not represent a delegation to the provincial legislature.

It seems rather hard to perceive any difference between direct delegation to a legislature and a delegation to an agent of the legislature, as the latter would also to a considerable extent disturb the exclusiveness or override the sovereignty of Dominion and provinces.1

1 See Ballam, Note (1952) 30 Can. B. Rev. 1050.
It follows that if the former device is unconstitutional, the latter should also meet the same fate. But in view of the decision in the Willis Case permitting delegation by Parliament to a provincial agency, the Supreme Court has, to that extent, restricted the application of the maxim "what cannot be done directly cannot be done indirectly".

It may be said in conclusion that the operation of our maxim found a fruitful scope in the realm of Canadian constitutionalism, and it has been one of the main tools used by the courts to prevent any abuse of power. This is mainly due to two factors. Firstly there is a double enumeration of powers, unlike the enumeration in the constitutions of the United States and Australia. Secondly many legislative powers, including the power to tax and spend, are defined by reference to purpose. In recent decisions of the Supreme Court of Canada\footnote{Potato Marketing Board v. Willis and Attorney-General for Canada, supra; Reference re Ontario Farm Products Marketing Act, supra; Murphy v. Canadian Pacific Ry. Co. (1958) 15 D.L.R. (2d.) 145; Crawford v. Attorney-General for British Columbia (1960) 22 D.L.R. (2d.) 321; Laskin, Provincial Marketing Levies: Indirect Taxation and Federal Power (1959) 13 Uni. of T. L.J. 1.} there is a tendency toward relaxation of the rigid compartmentalising of legislative powers, on which earlier decisions rested; there
has not, however, been any explicit repudiation of the general maxim here considered, nor of its extensive application by the Judicial Committee of the Privy Council, even though appeals to that body were abolished in 1947.¹

CHAPTER IV

Australia

In the Australian Constitution the division of legislative powers between the Commonwealth and the States resembles that of the United States model. The Commonwealth is assigned certain specified powers, while the States retain the residuum of power. Both the Commonwealth, on the one hand, and each of the States on the other, is within the ambit of its authority supreme, that is, clothed with plenary powers subject only to the restrictions or prohibitions imposed by the Constitution.

S. 51 of the Constitution as amended empowers the Commonwealth Parliament to make laws for the peace, order, and good government of the Commonwealth with respect to


2 See Amalgamated Society of Engineers v. The Adelaide Steamship Co. Ltd. (1920) 28 C.L.R. 129 (the Engineers' Case), at p. 153.
forty classes of subjects enumerated therein. But it does not in terms make these classes of subjects exclusive to the Commonwealth so that to each thee is the possibility that the States are also authorised to legislate with respect to them concurrently\(^1\). Besides these classes of subjects, the Constitution has expressly assigned exclusive power to the Commonwealth to make laws with respect to certain matters in s.52, and also in ss. 90, 114 and 115. S.122 further empowers the Commonwealth to make laws for the government of territories. The rest of the functions not covered by the concurrent or the exclusive field of the Commonwealth, and not denied to the States, fall within the exclusive jurisdiction of the States by virtue of s.107. S.109 then gives a Commonwealth law, overriding operation over a State law so far as there is actual conflict between the two laws.

The words 'with respect to' occurring in s.51 give a wide scope to the Commonwealth powers, and every legislative power carries with it the authority to make laws governing or affecting matters that are incidental or ancillary to the

\(^1\) As to some (e.g. (x), Fisheries in Australian waters beyond territorial limits) it is possible that the States never had power, and as to others (e.g. (vi), defence) subsequent prohibitions (e.g. s.114) exclude power, partly or wholly.
subject-matter of that power\(^1\). For example, laws with respect to taxation necessarily include many provisions besides the imposition of taxes, and all such provisions as are necessarily incidental or ancillary to the exercise of the power of taxation, are authorised by the express grant. In *G.G. Crespin & Son v. Colac Co-operative Farmers Ltd.*\(^2\), the question was whether s.152 of the Customs Act was a valid exercise of the Commonwealth power to make laws with respect to 'taxation'. That section in effect provided that where an alteration of the duty upon goods of a particular kind has been made after a contract for the sale of goods of that kind and before delivery, the seller was entitled to recover from the purchaser the difference caused by the alteration on the agreed price. The High Court sustained the section on the ground that such an adjustment of the incidence of taxation was within the power


\(^{2}\) *Supra.*
of taxation. Barton J. said:

It is true that it affects certain contracts, and that legislation upon contracts is ordinarily the province of the State and not of the Federation. But this is a case of the adjustment of obligations which necessarily are affected fairly or unfairly, but directly, by the federal law, and it is impossible to say that in such a case as this the endeavour to prevent the unfair effect is not within the competence of the makers of that law.

A question, which has occasioned much controversy, was whether, in like manner as incidental or ancillary powers are implied in the grant of legislative powers to the Commonwealth, certain restrictions could be implied upon the legislative powers of the Commonwealth and the States based upon implications from the federal nature of the Constitution. Such implications were recognised by the majority of the High Court as originally constituted, and the doctrines of immunity of instrumentalities and implied prohibitions were adopted as principles of constitutional interpretation. These doctrines required the courts to treat the Constitution as impliedly reserving (i.e., guaranteeing) to the States a certain minimum area of governmental power, and also the administrative organisation necessary to exercise this power.

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Ibid., at pp. 214, 215.
Generally speaking they were strongest from 1903 to 1920, weakest from 1920 to 1947, and since then had some revival. However, the existence of such doctrines is important for the consideration of the maxim under review, because such implied prohibitions are vague, flexible and potentially far-reaching and so provide numerous opportunities for invoking an argument of concealed breach of evasion.

Accordingly the Commonwealth powers received first

1 See e.g., Peterswald v. Bartley (1904) 1 C.L.R. 497; Emden v. Pedder (1904) 1 C.L.R. 91; Deakin v. Webb (1904) 1 C.L.R. 585; The Federated Amalgamated Government Ry. v. New South Wales Railway Traffic Employees Association (1906) 4 C.L.R. 488 (the Railway Servants Case); Baxter v. Commissioner of Taxation (1907) 4 C.L.R. 1087; R. v. Barger (1908) 6 C.L.R. 41; Attorney-General for New South Wales v. Brewery Employees Union of New South Wales (1908) 6 C.L.R. 469 (the Union Label Case); Huddart Parker & Co. Pty Ltd v. Moorehead (1909) 8 C.L.R. 330. However Isaacs and Higgins JJ. refused to imply such prohibitions and were in favour of giving full scope to Commonwealth powers; the Privy Council too, in Webb v. Outrim (1907) 4 C.L.R. 356; [1907] A.C. 81, held a view contrary to that of the High Court. See also R. v. Sutton (1907) 5 C.L.R. 789; Attorney-General for New South Wales v. Collector of Customs (1908) 5 C.L.R. 318; Heiner v. Scott (1915) 19 C.L.R. 381; Commonwealth v. New South Wales (1918) 25 C.L.R. 325.

2 See Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd (1920) 28 C.L.R. 129 (the Engineers Case).

restrictive and after the Engineers' Case expansive interpretation. It might be said that in a general sense the restrictive interpretation was a form of our maxim or at least achieved a similar result. More important, however, it is the case that the courts have consistently applied the maxim through all the phases of interpretation. Thus whenever the validity of a Commonwealth statute is in issue, regard must be had to its substance rather than its literal form and it cannot be brought within the Commonwealth powers by disguising it in such a manner that its form appears to be within the legislative competence.

In a complex constitution of this kind, interpreted (as it has been) with a good deal of attention to traditional legal casuistry, the possible occasions for invoking our maxim are almost limitless. However, it could be conveniently assumed that the powers most likely to be 'abused' in the sense indicated by our maxim are those under which illustrative cases have arisen - cases in which the principle expressed by the maxim has been relied on to a substantial extent in argument, whether successfully or not. Hence the Australian material is distributed in the following sections under 'power' rubrics indicated by the cases, but some regard is also
paid to *indirect* uses of some of those powers which have not been under judicial notice.

II

Firstly, cases relating to taxation. In *R. v. Barger*¹, the question related to the validity of the Commonwealth Excise Tariff Act of 1906, which provided for the imposition of excise duties on dutiable goods, but the Act was not to apply to goods manufactured by any person, in any part of the Commonwealth, who observed certain prescribed conditions. Dutiable goods were agricultural implements of different sorts, and the duty imposed was in some cases at fixed rates and in others at *ad valorem* rates. The defendants objected that, notwithstanding the title and phraseology of the Act, it was, in substance, not an exercise of the power of taxation conferred on the Commonwealth Parliament, but an attempt to regulate the internal trade and industry of the States, which was not within the powers of the Commonwealth but was reserved to the States. The High Court, *Isaacs* and *Higgins* JJ. dissenting, upheld the objection, and the Act was declared invalid.

Within the ambit of its authority the Commonwealth

¹ *(1908) 6 C.L.R. 41.*
Parliament is plenary and supreme, and the exercise of powers conferred upon it may produce indirect or incidental consequences upon powers conferred on State legislatures. But in a federal constitution in which the competency of a legislature is not unlimited, it would be legitimate, in determining the validity of a statute, to inquire as to the extent of the legislative power concerned and the ambit of limits, if any, upon the exercise of that power under the Constitution. It was in respect of these inquiries that the majority and minority opinions differed. The majority was of the view that the Commonwealth powers were to be understood as limited by implied prohibitions against any direct interference with matters reserved exclusively to the States. On the other hand, Isaacs and Higgins JJ. refused to limit the extent of the exercise of Commonwealth powers by first assuming the extent of State powers. Their Honours thought that the Commonwealth powers might be exercised to their utmost extent and in as plenary a manner as if the Commonwealth were a unitary State subject only to the express limitations found in the Constitution itself; and the powers of the States were, therefore, those which remained after full effect was given to the Commonwealth powers.

Then the question turned upon the characterisation of the Excise Tariff Act as to whether it was in reality an
exercise of the Commonwealth taxing power. Could the Commonwealth Parliament by the exercise of its taxing power make the liability or non-liability to taxation conditional upon the observance of certain conditions defined in the Act? It was conceded by all that the Court should give regard to substance and not to form or label of the Act. But the operation of this principle presupposes the nature and character of the powers of Commonwealth and States and the extent of limitations upon their exercise. Its scope would, therefore, oscillate along with the interpretation, restrictive or expansive, given to the Commonwealth powers.

Thus as to the question of substance, the majority was of the view that as, under the Act, the selection of a particular class of goods produced in Australia for taxation by a method which made the liability to taxation dependent upon certain conditions to be observed in the industry in which they were produced, the Act was, under the guise of an exercise of the taxing power, an unjustifiable regulation of the conditions of manufacture of these goods, i.e., an interference with the domestic affairs

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(1908) 6 C.L.R. 41, at p. 75 per Griffith C.J., at p. 118 per Higgins J.
of a State. This conclusion was reinforced by a suggestion that a law similar to the one challenged could be validly framed by a State legislature, and therefore it was only the State legislature which was competent to do so. It did not matter whether the fee imposed was called duty of excise or by some other name.  

However, following the expansive interpretation of the Commonwealth powers, the operation of our maxim would be restricted to the bare minimum. Thus Isaacs and Higgins JJ. were of the view that the Act imposed taxation upon agricultural implements which were not in fact manufactured under defined conditions but did not render any conditions unlawful, and it was consequently not a regulative Act, which a State could pass in the same terms, but an exercise of the taxing power, and, if passed by a State legislature, would be invalid, since it would be a duty of excise prohibited to the States.  

Griffith C.J. pointed out that the means adopted to achieve certain ends had to be distinguished from the ends themselves. The fact that taxation might produce indirect

1 Ibid., at pp. 74 and 76.  
2 S.90 of the Constitution.
consequences was irrelevant to the question of competence to impose the tax. Similarly the motive which actuated the legislature, and the ultimate end desired to be obtained, were equally irrelevant. But the motive or indirect results in contemplation of the legislation are not to be mixed up with the purpose of the Act. "An inquiry into the purpose of an Act", said Griffith C.J., "is not an inquiry into the motives of the legislature, but into the substance of the legislation"\(^1\). On the other hand, Isaacs J. made no distinction in dealing with purpose on the one hand and motive or object on the other, and thought that all of them were irrelevant in any inquiry into the substance of the Act\(^2\). This difference of approach to the relevancy of purpose has also a bearing upon the maxim under consideration as purpose does provide a ground for recognising the substantial nature and character of an Act.

The relevancy of purpose was also used in supplying an answer to the argument that the conditions attached to the taxation were not in substance a regulation of the

\(^1\) Ibid., at p. 75.

\(^2\) Ibid., at p. 98; cf. Higgins J. at p. 118; perhaps his Honour referred as motives or consequences to what Griffith C.J. meant as purposes.
manufacture. Griffith C.J. said that though the regulation was not in the nature of a law providing sanction for its disobedience, the sanction was the same in substance, and equally effectual, in either case. Otherwise "the Commonwealth Parliament might assume and exercise complete control over every act of every person in the Commonwealth by the simple method of imposing a pecuniary liability on everyone who did not conform to specified rules of action, and calling that obligation a tax, not a penalty". However, if purpose is not relevant, it would be hard to conceive a taxing Act to be regulatory unless it is apparent on its face as providing a pecuniary penalty imposed as a punishment for an unlawful act or omission.

Another factor which needs attention is whether a legislative power is defined by reference to purpose. If an Act is passed in pursuance of a power which is not defined by reference to purpose, such as the taxing power, purpose may not assume such importance as in the case of a power defined by reference to purpose. Looking from this point of view, it may be that in so far as the relevancy of

1 Ibid., at p.77. Of course these observations presuppose that the taxing power could not be construed as depriving the States of their exclusive powers reserved to them.

2 See Stenhouse v. Coleman (1944) 69 C.L.R. 457 at p.471, per Dixon J.
purpose in relation to the validity of the Excise Tariff Act was concerned, the view adopted by Isaacs and Higgins JJ. was preferable.

However, apart from the question of the relevancy of purpose as such, purpose and motive often overlap and it is not easy to distinguish one from the other, and in a border-line case it is largely a matter of opinion. For example, in Osborne v. Commonwealth\(^1\), the use of the taxing power was approved by the High Court so as to achieve purposes other than revenue without ceasing in substance to be taxation. In that case the Land Tax Act, as explained by the Land Tax Assessment Act, was questioned on the ground that it was not truly an exercise of the taxing power, but was an attempt to prevent the holding of large quantities of land by a single person, a subject within the exclusive competence of the States. The High Court held that the Act was in substance and in form an Act imposing taxation. The exposition of the decision is found in the opinion of Barton J., that the objectionable purposes alleged were not to be collected from the terms of the Acts and there was nothing in them which specified who should hold land and who should not, or how much land any person should hold.

\(^1\)(1911) 12 C.L.R. 321.
"They may be", he said, "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".  

At first glance Osborne's Case may appear to be somewhat difficult to reconcile with Barger's Case, but on closer analysis of the Acts involved in these cases, one could be distinguished from the other. The pertinent question was how to determine the purpose of the Land Tax Act and the Excise Tariff Act respectively. As pointed out by Barton J., "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 in substance 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". Applying this criterion the Land Tax Act was distinguishable from the

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1 Ibid., at p. 345.
2 Taking for granted that the purpose, as distinct from motive, was relevant, in the exercise of the taxing power.
3 (1911) 12 C.L.R. 321, at p. 344.
Excise Tariff Act in that the land tax imposed was not dependent upon any express conditions and the purpose, if it could be distinguished from the motive, had to be implied from the consequences of the operation of the Act, whereas the excise duty was directly related to the conditions of manufacture of agricultural implements, as these conditions were expressly provided in the Act, and formed the very basis of exemption from payment of the duty. In the Osborne Case, the purpose of controlling land holdings had to be derived by implication from information not in the Act - information of a general political and economic character.

It is true that after the expansive interpretation received by the Commonwealth powers in the Engineers Case the scope of the operation of our maxim has been considerably restricted, but it was still applied with equal effectiveness to uncover any disguised encroachment by State laws upon the jurisdiction of the Commonwealth Parliament. In Commonwealth Oil Refineries v. South Australia¹, the Act in question was described as an Act to impose a tax upon the income of vendors of motor spirit, and for other purposes. It levied three pence for every

¹(1926) 38 C.L.R. 408.
gallon of motor spirit sold and delivered in South Australia to persons within that State for the first time after (a) entry into the State, or (b) production or refining in the State. The first vendor had to pay the tax, but the tax was one which normally would be passed on to the buyer. One of the grounds\(^1\) of attack on the validity of the Act was that the tax imposed was a duty of customs and excise and, therefore, beyond the competence of State legislatures by force of s. 90\(^2\) of the Constitution. The High Court (Gavan Duffy J. dissenting) held the Act invalid on that ground. Following the reasoning in Peterswald v. Bartley\(^3\), it was explained that in order that a levy might come within an excise duty law, it should be so connected with the production of the article sold or otherwise so imposed as in effect to be a method of taxing the production of the article\(^4\). Here in the ordinary course

\(^1\) The other ground was that the tax would operate as a restraint on the freedom of trade, commerce and intercourse among the States in contravention of s. 92 of the Constitution.

\(^2\) It provides: "On the imposition of uniform duties of customs the power of the Parliament (Commonwealth) to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive".

\(^3\) (1904) 1 C.L.R. 497.

\(^4\) The law on this subject is in a somewhat uncertain state: see Mathews v. The Chicory Board (1938) 60 C.L.R. 263; Hopper v. The Egg Board [1939] A.L.R. 249.
of events the first seller within the State of such
spirit was the producer. In effect the tax was payable
by every producer in the State of motor spirit on all
spirit produced by him within the State, except so much
thereof as was not sold or was sold for export from the
State. Such a tax was essentially a tax on production,
and was therefore an excise duty.

Another example of a State law purporting to do indir-
ectly what it could not do directly is found in Attorney-
General for New South Wales v. Homebush Flour Mills Ltd\(^1\).
The Flour Acquisition Act 1931-33 (N.S.W.) provided for
the expropriation of flour coming into existence after the
commencement of the Act in New South Wales and to vest it
in the Crown, and to convert all rights and interests there-
in into claims for compensation. The amount of compensa-
tion was to be calculated by the difference between "the
fair and reasonable price" as fixed, without regard to
grade or quality, by a committee under the Act, and a
"standard price" fixed by the Governor in Council. Unless
and until possession was demanded by the Crown, the flour
was left in the possession of the expropriated owner, who
\(^1\) (1937) 56 C.L.R. 390.
held it for the Crown at his own risk. It was the duty of the Minister to sell any flour vested in the Crown under the Act, but the owner of the flour was given a first right to purchase it, and its sale or disposition by such owner was deemed an exercise of such right. The price which the owner was required to pay for the flour in the case of flour for human consumption was the "standard price" as fixed by the Governor in Council. The compensation was to be set off against the "standard price" and "the balance of the purchase money" was payable under penalty to the Minister. If the owner did not choose to exercise his right to purchase the flour acquired from him, the Minister had the power to sell it, and the owner then could only get his compensation or the amount realised less expenses, whichever was the lesser amount. The proceeds of any sale received by the Minister were to be paid into a special fund for the relief of necessitous farmers. The High Court unanimously held that the Act infringed s.90 of the Constitution and was therefore invalid.

The Act was sought to be justified on the ground that each part of the Act was within the power of the State legislature: firstly, the legislature had the power to pass a law acquiring property, and then the State could sell
the property so acquired and, if a profit was made, could receive and spend the money. But "it is an analysis", replied Latham C.J., "which, like the dissection of a living thing, may destroy reality in professing to exhibit it". It is true that the validity of an Act must be determined by reference to its legal character and not its practical results, effects or consequences which it might happen to produce; at the same time, it has to be examined as a whole in order to inquire into its substance or real object. The essential part of the Act was the adoption of the "standard price" that exceeded the "fair and reasonable price" fixed by the Committee. The Act did not say that the price fixed for resale to the owner should be higher than the Committee's price, but it contemplated such an excess, for it assumed in its provisions that the proceeds should be applied to the relief of necessitous farmers. As the adoption of the "standard price" was to be determined by the Executive under the Act, it was the act

1 Ibid., at p. 399.
2 Ibid., at pp. 398 and 401 per Latham C.J., at p. 404 per Rich J., at pp. 407, 408 per Starke J. It was also apparent from the course adopted by Dixon and McTiernan JJ. in the examination of the Act. Evatt J. was of the opinion that where the Court had to investigate the question whether a State enactment imposed a duty of excise, it might be necessary to look into the actual operation of the enactment: ibid., at p. 418.
of the Executive that resulted in the payment of the
difference between the two prices to the government, and
that amounted to a tax.

But it was objected that the Act did not involve any
imposition of taxation because the prior owners of the
expropriated flour were under no obligation to re-purchase
the flour and, therefore, had the option of not paying
any money to the government. A strong inducement held out
to the divested owners to purchase could not be construed
into a legal compulsion. But all members of the Court
were of the opinion that looking at the provisions of the
Act, the option conferred on the owners was illusory or
unreal, for in practice they were compelled to pay the
"balance of the purchase money" or in the alternative to
give up the business altogether. The situation, in which
the owner was placed, was explained by Dixon J. thus: "The
dilemma consisted of alternatives prescribed by or under
the statute. The one, namely, sale, involved the levy of
a tonnage rate. The other involved loss of his power of
disposal of the flour, storage of the flour at his own
risk and expense for as long a period as the Executive
Government chose, and a title to no greater sum than the
net proceeds of the flour when and if sold by the Crown
and perhaps to less. It involved also the suspension of
the miller's ordinary business. The disadvantages thus
artificially created from a strong deterrent under the
influence of which he would be extremely unlikely to reject
the alternative involving payment of the subvention to the
special fund at the ascertained rate per ton"¹.

This objection raises an important issue as to the
distinction between inducement and compulsion, and when
inducement reaches the stage of compulsion. Dixon J.
suggested that when the desired contributions were obtained
not by direct command but by exposing the intended contrib­
utor, if he did not pay, to worse burdens or consequences
which he would naturally seek to avoid, the payment became
an exaction. But an assessment of burdens or consequences is
subjective, and in a dilemma consisting of alternatives,
i.e., payment or non-payment of the contribution, it would
not be easy to lay down any criteria in order to assess
which of the burdens or consequences would be worse.
However in the present case the Court was unanimous in
declaring that the payment of the difference between the
two prices was nothing else but exaction of money as
taxation. "Although it is true", Dixon J. said, "that

¹Ibid., at p. 411.
the statute does not impose an ordinary legal duty to pay enforceable by judicial process, it makes the raising of money its purpose and seeks to secure fulfilment of that purpose by imposing a clear detriment upon the miller who refrains from paying". Such a detriment appeared to him to be indistinguishable from a sanction incurred by failure to pay. Rich J. was also of the same view when he said that the substance of the Act was to impose a tax subject to a means of escape which no one would adopt if he considered the business and the pecuniary consequences. McTiernan J. tried to explain exaction in terms of expropriation as a means to achieve collection of revenue. He said that the State legislature had contrived to enable the owner of the flour to sell any flour which had been expropriated as if there had been no expropriation. But it had attached to any sale under this power the liability of contributing money to the revenue, the expropriation being the means to an end.

Further, though the exaction was payable upon the sale of flour, it was a tax by way of indirect taxation amounting

1 Ibid., at p. 412.
2 Ibid., at p. 405.
3 Ibid., at p. 421.
to an excise duty. Evatt J. reinforced this view by pointing out that the Act intended that the owners would pass the tax on to their customers to the intent that the public as the ultimate consumer of flour, would bear the real burden of the levy or charge. Thus the real object of the Act was not to acquire flour by the State for its own purposes, but to impose an excise duty. The Act was, therefore, plainly an attempt to evade the constitutional provision which prevented a State law from imposing any duties of excise.

It may, therefore, be said that the power to tax may be used to achieve "indirect purposes" for so to do would normally be irrelevant to the validity of a taxing Act. But the purpose may become relevant if an Act is punitive in character or the purpose it deals with a matter outside the ambit of Commonwealth powers, or prohibited to the Commonwealth, and this plainly appears from its terms, including any clear inference from them.

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1 See Peterswald v. Bartley, supra; Commonwealth Oil Refineries Ltd. v. South Australia, supra; John Fairfax & Sons Ltd. v. New South Wales (1927) 39 C.L.R. 139.

2 (1937) 56 C.L.R. 419.
A recent Act relating to income tax provided that the interest paid or payable on borrowed capital would not be treated as an allowable deduction from the assessable income of companies (excepting those provided therein) in respect of certain outgoings. This was in political fact a device to discourage borrowing money direct from the public at high interest rates by certain types of companies, such as hire-purchase companies, which could pass on these rates to their customers. However, this ulterior purpose (or motive) cannot be inferred from the provisions of the Act. Therefore it is unlikely that the Barger's Case doctrine or our maxim has any application to such a case.

III

After money has been raised as revenue by the Commonwealth, another question arises as to whether it can be appropriated in fields over which the Commonwealth has no legislative authority. If it is so, then the Commonwealth could achieve indirectly many purposes which it could not achieve directly by acting within the ambit of its  

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1 Act 108 of 1961 (Cwth).
legislative powers. S.81\(^1\) of the Constitution states that the money or revenue is to be appropriated for the "purposes of the Commonwealth". But the expression "purposes of the Commonwealth" is ambiguous, and questions have arisen as to whether it means only purposes related to the other legislative, executive and judicial powers given to the Commonwealth, or extends to any purpose whatsoever on which the parliament chooses to spend money. Its meaning came up for discussion in *Attorney-General for Victoria v. Commonwealth*\(^2\), but the decision in the case did not depend upon the acceptance of one or other of the views. However, it was recognised that even if the Commonwealth has an unlimited spending power, nevertheless under the guise of appropriating revenue the Commonwealth could not legislate with respect to subject-matters falling within the jurisdiction of the States. In this case the question related to the validity of the Pharmaceutical Benefits Act of 1944, which provided for the supply by chemists without charge to the public of certain medicines prescribed by medical practitioners; the Act appropriated money to pay the

\(^{1}\) It provides: "All revenues or money raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution."

\(^{2}\) (1945) 71 C.L.R. 237, (the *Pharmaceutical Benefits Case*).
chemists for the medicines supplied, and imposed duties on medical practitioners and chemists in relation to the prescription and supply of medicines. The attack upon the Act was based upon the contention that it was not authorised by any power conferred upon the Commonwealth under the Constitution, and, therefore, invaded the State legislative area. The Commonwealth sought to justify its action by invoking s.81 in conjunction with the incidental power - s.51(xxxix) of the Constitution. It was argued that s.81 in itself contained an independent grant of power to appropriate revenues or moneys for the "purposes of the Commonwealth", and that power was to be exercised by making laws - s.83. It was not disputed that s.17 of the Act which provided for an appropriation of money would be invalid, but as to other provisions contained in the Act it was said that they were incidental to the appropriation made under s.17, or to the purpose for which money was

The other contention involved the issue of locus standi to challenge the validity of the Act, but it was held by Latham C.J., Rich, Starke, Dixon and Williams JJ., that the Attorney-General of a State had a sufficient title to invoke the provisions of the Constitution for the purpose of challenging the validity of Commonwealth legislation which extended to, and operated within, the State whose interests he represented. Cf. Massachusetts v. Mellon (1923) 262 U.S. 447.

It provides: "No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law."
appropriated, viz., the provision of pharmaceutical benefits, and the enactment of the provisions other than s.17 was authorised by s.51(xxxxix). The High Court held (McTiernan J. dissenting) that the Act was not justified by s.81 or s.51(xxxxix), and was, therefore, invalid.

It may be noted that the spending power, in contrast to the taxing power, is defined by reference to purpose, viz., revenues or moneys to be appropriated for the "purposes of the Commonwealth", and the validity of an appropriation of money by the Commonwealth has to be determined by reference to that purpose. "In other words, there cannot be appropriations in blank, appropriations for no designated purpose, merely authorising expenditure with no reference to purpose. An Act which merely provided that a minister or some other person could spend a sum of money, no purpose of the expenditure being stated, would not be a valid appropriation Act". Thus it would be logical first to understand the meaning of the purpose for which money could be appropriated under s.81.

Latham C.J. said that the words "purposes of the Commonwealth", which plainly included purposes "in respect

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of which Parliament has power to make laws", were not identical in meaning with the latter words, and were intended to include Commonwealth purposes other than those in respect of which power to make laws was given elsewhere in the Constitution, otherwise they would have no legal effect whatever. As the appropriation was to be made by law, it was, the Chief Justice pointed out, not the Executive or the Judiciary but the Commonwealth Parliament which was the proper authority to determine what purposes were purposes of the Commonwealth. Thus, in his opinion, the Commonwealth Parliament had a general, and not a limited, power of appropriation of public moneys. It was general in the sense that it was for the Parliament to determine whether or not a particular purpose should be adopted as a purpose of the Commonwealth. Starke and Williams JJ. took a restrictive view and agreed that the "purposes of the Commonwealth" were more specific than the "general welfare of the United States". Starke J. was of the view that the Commonwealth did not have unlimited power to appropriate its revenues or moneys for any purpose that it thought proper. The "purposes of the Commonwealth" were those of an organised political body established under the Constitution and empowered with legislative, executive and judicial functions, whatever was incidental thereto, and matters arising from
the existence of the Commonwealth and its status as a Federal Government, e.g., payment etc., of members of Parliament, exploration and so forth. Similarly Williams J. said that the insertion of these words, if they were to have any effect, must place some constitutional limitation upon the purposes for which the Commonwealth Parliament could pass an appropriation Act. The Commonwealth, as distinct from the States, was created for certain specific purposes, and those purposes must all be found within the four corners of the Constitution. Dixon J., with whom Rich J. was in substantial agreement, also emphasised the fact that the words "purposes of the Commonwealth" could not be regarded as doing the work which the words "general welfare" have been required to do in the United States, but he did not think it necessary to explain any further in the present case. However, he added that in determining the validity of a law making appropriation, it would be necessary to remember what position a national government occupied, and the basal consideration would be found in the distribution of power and functions between the Commonwealth and the States. It was likely that his Honour might have taken sides with Starke and Williams JJ., if the decision in the case had hinged on this point. McTiernan J., like Latham C.J., took the widest possible meaning of
the purposes under s.81, and thought that the purposes of
the Commonwealth were such purposes as the Parliament
determined.

In spite of the differing views as to the meaning of
the "purposes of the Commonwealth", all members of the
Court except McTiernan J. were of the opinion that the Act
could not be supported under s.81 because it purported to
appropriate money for a purpose which was not the purpose
of the Commonwealth, i.e., the regulation of public health,
doctors, chemists, hospitals, drugs, medicines and medical
and surgical appliances. Latham C.J. said that though the
determination whether a particular purpose should be
regarded and adopted as a Commonwealth purpose was a
political matter, the power to appropriate and spend money,
however wide that power might be, did not enable the
Commonwealth to extend its legislative powers beyond those
marked out and defined by the Constitution, although, in
his opinion, those powers included a general appropriation
power. "The result of a contrary view would be", he explained,
"that, by the simple device of providing for the expenditure
of a sum of money with respect to a particular subject-
matter, the Commonwealth could introduce a scheme which in
practice would completely regulate and control that
subject-matter"¹. Dixon J. also thought that even with the widest possible construction of the power of appropriation, the Act was invalid, as it contained a general legislative plan covering much more than the appropriation of money; it was the appropriation of money which was the consequence of the plan and not vice versa. Starke and Williams JJ. in giving a restrictive interpretation to "purposes of the Commonwealth" had no hesitation in declaring the Act beyond the competence of the Commonwealth.

As to the argument based upon s.51 (xxxix), Latham C.J. said that it was of no avail; this power authorised legislation with respect to matters incidental to the expenditure of the money, but did not authorise legislation which was incidental only to the purposes for which the money appropriated was to be expended, unless there was power to make laws for such purposes. On the other hand, McTiernan J. thought that the Act could be justified as incidental to the appropriation power because it defined, specified or limited the purpose of appropriation, or because it was incidental to the expenditure of the appropriated revenue.

It is true that the difference of opinion in the Court¹

¹(1945) 71 C.L.R. 237, at p. 263.
as to the meaning of the "purposes of the Commonwealth" did not affect the decision in the case; however, doubts arose as to the constitutionality of other social services schemes in operation at that time involving appropriations, such as maternity allowances, child endowments, widows' pensions and unemployment and sickness benefits. It was likely that the majority (Rich, Starke, Dixon and Williams JJ.) of the members of the Court who took part in the Pharmaceutical Benefits Case might be unwilling to regard the purposes of these schemes as the "purposes of the Commonwealth" under s.81. Thus in 1946, s.51(xxiiia) was introduced into the Constitution as an amendment enabling the Commonwealth to make laws with respect to various social services. Thereafter the Commonwealth Parliament enacted the Social Services Act 1947-1959 consolidating the law relating to the payment of age pensions, invalid pensions, widows' pensions, maternity allowances, child endowment, unemployment benefits and sickness benefits, and for other purposes, and the National Health Act 1953-1959, relating to the provision of pharmaceutical, sickness and hospital benefits, and of medical and dental services.

1 It provides: "The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances."
On first reading, Part VII of the Social Services Act which deals with the Commonwealth rehabilitation service might seem not to be covered by any of the categories provided in placita (xxiii) and (xxiiiA) of s.51. That part provides in detail the treatment and training of (i) pensioners and claimants for invalid pensions, (ii) beneficiaries and claimants for benefits who, without that treatment and training, would be likely to become unemployed, (iii) persons in respect of whom allowances are being paid under s.9 of the Tuberculosis Act 1948, and (iv) persons between the age of fourteen and sixteen years, and who, without that treatment and training, would be likely to become qualified to receive pensions on attaining the age of sixteen years. The treatment and training of persons in (ii) and (iii) are justifiably covered under the categories of unemployment, sickness and hospital benefits, but as to persons in (i) and (iv), it may be argued that the word 'pensions' should not be stretched so as to include the concept of treatment and training. However, "These matters", as Dixon J. explained, "should be interpreted widely and applied to no narrow conception of the functions of the central government of a country in the world of to-day"\(^1\). Moreover, such an extension of the area of

\(^1\) (1945) 71 C.L.R. 237, at p. 269.
legislation would be warranted by s.51(xxxix). Thus it would not be unreasonable to assume that that part of the Act is valid.

There has been much appropriation of money for purposes of research carried on by research organisations established by the Commonwealth, such as to be found under the heading of Research and Science in Vol. III of the Commonwealth Acts 1901-1935, and Vol. VI of the Commonwealth Acts 1901-1950 - Institute of Anatomy, Economic Research, Forestry Bureau, Geo-physical Survey, Science and Industry, Endowment and Research\(^1\). The most notable example is the Council of Scientific and Industrial Research Organization, now operating under the Science and Industry Research Act 1949, for the purpose of, among others, the initiation and carrying out of scientific researches and investigation in connection with, or the promotion of, primary and secondary industries in the Commonwealth. In the modern age of rapid scientific progress, expansion and promotion of scientific and industrial research in Australia is not only necessary as a national matter for the general welfare of the population, but also important in the sphere of international affairs so as to maintain its position among

\(^1\) In some cases there has been only an appropriation of money such as for Antarctic exploration.
the nations by keeping pace with technological developments in other parts of the world. From this point of view the appropriation of money for certain research activities relating to matters which are of a general nature such as rabbit control by the use of myxomatosis or some other chemical, or matters upon which the economy of the country is directly based, such as improving the quality of wheat, or preservation of meat, or development of economic processes in giving additional desirable properties to wool fibres to enable it to compete successfully with synthetic fibres, would be a "matter arising from the existence of the Commonwealth and its status as a Federal Government", and even on the narrower view of the "purposes of the Commonwealth" the chances are that it might be regarded as a valid exercise of the appropriation power under s.81. However, the validity of the appropriation of money for research into matters such as child illnesses which the Institute of Child Health undertakes, or obscure animal nutritional problems, is not certain. Accordingly, the Joint Committee on Constitutional Review appointed in 1959 recommended for an amendment in the Constitution by adding the subject of scientific and industrial research in s.51 in respect of which the Commonwealth Parliament may make laws.\footnote{Report from the Joint Committee on Constitutional Review (1959), at p. 73.}
It was noted above that in the Pharmaceutical Benefits Case, a distinct question was whether the plaintiffs or some of them had *locus standi* to sue. The existence of adequate legal procedure for testing questions of constitutional validity and enforcing restrictions on competence is indeed a pre-condition for the operation of our maxim over the whole area of its possible application. However, the question of *locus standi* is specially important in relation to questions under the spending power, because of the persuasive influence of the decision in *Massachusetts v. Mellon*\(^1\), and the sort of doctrine it embodies - a judicial unwillingness to permit appropriations to be challenged by persons who are merely taxpayers\(^2\). It may be suspected that this procedural difficulty has contributed a good deal to the apparent ability of the Commonwealth to spend money on ways not clearly within its powers under the "narrow" construction suggested in the *Pharmaceutical Benefits Case*. Even if the State Attorneys-General have *locus standi* to challenge a mere appropriation (which is not at all certain) they are unlikely to object to the kind of activity carried on by the Council of Scientific and Industrial Research

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\(\text{\textsuperscript{1}}\) (1923) 262 U.S. 447.

\(\text{\textsuperscript{2}}\) In case of Commonwealth expenditure not accompanied by the creation of legal duties, private or special interests affecting the position of individuals, the difficulty of *locus standi* to challenge the expenditure would be much greater: *Anderson v. Commonwealth* (1932) 47 C.L.R. 50.
Organization, and no private person is likely to have *locus standi* to object.

IV

Another power analagous to the spending power that has been extensively used as a device by the Commonwealth to achieve something indirectly which it could not achieve directly is s.96 of the Constitution. It provides that the Commonwealth Parliament may grant financial assistance to any State on such terms and conditions as it thinks fit\(^1\). Conditional grants have been made to the States from time to time in respect of several activities\(^2\), and the main issue that has arisen is whether the Commonwealth may induce a State by offering a grant with conditions attached to do something that it could not do by acting within the ambit of its constitutional powers. The High Court is of the view that the imposition of such conditions attached to a grant is validly authorised under s.96. Thus in *Victoria v. Commonwealth*\(^3\), the Federal Aid Roads Act, 1926, which

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1. In the United States and Canada it is done under the power to tax and spend.
3. (1926) 38 C.L.R. 399.
purported to authorise the execution by and on behalf of the Commonwealth of agreements between the Commonwealth and each State, and to appropriate the Consolidated Revenue Fund to the extent of such amounts as was necessary for the purposes of each agreement exercised by the Commonwealth, was upheld as a valid enactment.

Moran v. Deputy Federal Commissioner of Taxation, provides a typical example where s.96 was used as a device to get around the prohibition against discrimination in taxation between States as provided in s.51(ii) and s.99 of the Constitution by making grants to some States and not to others. The Commonwealth imposed excise duties on flour at a uniform rate throughout the Commonwealth, but paid an amount equal to that raised in Tasmania to the Tasmanian government, which paid it back to the original taxpayers. The excise duties were imposed with the object of assisting the wheat-growing industry which at that time was in a depressed condition, but it raised no problem in Tasmania where there were no wheat-growers. Accordingly s.96 was used as a device to exempt Tasmanian millers from the payment of tax. The High Court, and on appeal Privy Council, held it valid. Latham C.J. explained in

(1939) 61 C.L.R. 735; 63 C.L.R. 338 (P.C.); [1940] A.C. 838.
South Australia v. Commonwealth\(^1\) that there might be discrimination between States and preferences to States under s.96 because that section was not subject to any limitation with respect to discrimination.

The scheme involved in Moran's Case in no way affected the balance between the Commonwealth and States as to their respective legislative powers, and its successful operation was mainly due to the co-operation between the Commonwealth and the State governments. But the recognition of s.96 as a means of enabling the Commonwealth virtually to curtail the autonomy of the States, despite their unanimous opposition, was highlighted in the First Uniform Tax Case. The scheme involved in that case consisted of four Acts by which the Commonwealth took over State income taxation departments and made it virtually impossible for the States to impose any income tax. The question was whether the Acts were to be considered separately or as part of the scheme to bring about the abandonment by the States of the power to tax. The High Court followed the former course and held that all the Acts were valid (Latham C.J. and Starke J. dissenting as to some of the Acts involved). As to the Grants Act (one of the four Acts), which provided

\(^1\) (1942) 65 C.L.R. 373 (the First Uniform Tax Case).
that each State that retired from the field of taxation should be given a grant equal to its average receipt from that source during the period 1939-41, it was said that the Act was valid under s.96 as it was in substance a law granting financial assistance to any State to which it became payable.

It was urged that the inducement offered by the Grants Act practically amounted to coercion compelling the States to surrender the power to tax incomes. Latham C.J. considered that temptation (or very attractive inducement) was not coercion and said that in the present case the States were not coerced as the Act provided for only a very attractive inducement and there was no command that they would not impose such a tax on income. However Starke J. disagreed with this view and thought that the condition imposed by the Act amounted to abdication by the States of their powers of taxation. "The argument that the States Grants Act leaves a free choice to the States, offers them an inducement but deprives them of and interferes with no constitutional power", he said, "is specious but unreal". An argument based on compulsion would in any case

1 (1942) 65 C.L.R. 373, at pp. 417, 418.  
2 Ibid., at p. 443.
fail if the Grants Act is examined separately as offering financial assistance would never reach the stage of compulsion. There may be a possibility of its success if the Tax Act and the Grants Act are examined as parts of a legislative scheme, but it was not as was thought by the Court, the case there.

The High Court had in *Victoria v. Commonwealth*¹, another opportunity to examine the uniform tax scheme which was put on a permanent basis after the last war, and again held it to be valid. Though the old Acts were repealed and replaced by a fresh set of Acts, they were almost identical with those considered in the First Uniform Tax Case and operated substantially the same way.

The decision on the Grants Act in the Second Uniform Tax Case mainly hinged on the nature of conditions that could be attached to a grant given under s.96. It was argued that the Grants Act was not a grant of financial assistance as the conditions attached were intended to place the States in a situation where they were not free to follow the course which otherwise they might have taken within the ambit of their constitutional powers. In other

¹ (1958) 99 C.L.R. 575 (the Second Uniform Tax Case).
words, applying the rule in Barger's Case, could it not be argued that the Act, in its substance, was one interfering with the autonomy of the States? In order to understand the full implications of this argument it becomes necessary to have a proper understanding of the Commonwealth legislative powers as to their scope and character, particularly after the Engineers' Case, and the nature of restrictions upon their exercise.

In Melbourne Corporation v. Commonwealth, Dixon J. explained that the effect of the Engineers' Case was that a power to legislate with respect to a given subject enabled the Commonwealth Parliament to make laws which, upon that subject, affected the operation of the States and their agencies. This rule was, however, subject to certain reservations, one of which, in his opinion, related to the use of federal legislative power to make, not a law of general application, but a law which discriminated against States and interfered with the exercise of powers and the fulfilment of functions constitutionally belonging to them. Though this sort of interference may arise by a law enacted with respect to a matter falling within the enumerated subjects of federal legislative power, it must be so enacted

1 (1947) 74 C.L.R. 31 (the State Banking Case).
as to restrict State action, the prescribing of the course the State government must take or the limiting of the courses available to it.

If a law is connected with a subject of Commonwealth power, but not so as to restrict any State action, its validity would simply depend upon whether it ought to be regarded as enacted with respect to the specified matter falling within the Commonwealth power. If the law has an actual and immediate operation within a field assigned to the Commonwealth, it would be held to fall within the power unless some further reason appears for excluding it. However, relevancy of purpose (or motive) is irrelevant in such an inquiry and a law may be valid notwithstanding a purpose (or motive) of achieving some result which lies within the jurisdiction of the States. But the same doctrine could not be applied to a use of federal power for a purpose restricting or burdening the State in the exercise of its constitutional powers. "The one involves no more than a distinction between the subject of a power and the policy which causes its exercise. The other brings into question the independence from federal control of the State in the discharge of its functions". Thus purpose is

[(1947) 74 C.L.R. 31, at p. 80, per Dixon J.](#)
relevant in determining the validity of a law if it interferes with the exercise of constitutional powers or functions of a State in spite of the fact that it is enacted with respect to a matter falling within the Commonwealth power.

However it is not necessary that a restriction or burden a law seeks to impose upon State action must be placed directly upon the States or their agencies. "The duty may be imposed", observed Dixon C.J. in the Second Uniform Tax Case, "not on the State or its servants, but on others and yet its intended operation may interfere unconstitutionally with the governmental functions of the State in such a way as to take the law outside federal power". For example, s.48 of the Banking Act, 1945, prohibited the banks from doing the business of the States unless the Treasurer of the Commonwealth consented. It was held in the State Banking Case that that section was not a valid exercise of the power in relation to banking conferred upon the Commonwealth Parliament by s.51(xiii) of the Constitution, which did not authorise the making of a law directed to the control or hindrance of the States in the execution of their governmental functions. The primary prohibition was laid upon the banks and not upon

1(1958) 99 C.L.R. 545, at p. 610.
the States, but it was immaterial because it was just as effectual to deny to the States the use of banks and that was its object. Even though the law could be characterised as relating to "banking", its object was to interfere with the normal banking business carried on by the States. To that extent "object" or "purpose" was relevant in determining the validity of the Act.

There was a suggestion by Dixon J. that the federal legislative power might be classified broadly into two categories, i.e., those in respect of which a law might be based upon the subject-matter, and those in respect of which a law, in addition, might also restrict or control a State in the exercise of its constitutional functions, as in the case of most powers some ingenuity would be needed for a law to deal with both the aspects. "It is, for instance, difficult to see how any law based on the power with respect to lighthouses, astronomical observations, fisheries, weights and measures, bills of exchange or marriage could be aimed at controlling States in the execution of their functions. But to attempt to burden the exercise of State functions by means of the power to tax needs no ingenuity".  

1 (1945) 74 C.L.R. 31, at p. 80, per Dixon J.
Thus a restriction on the former could be implied from some conception of purpose for which the particular power was conferred upon the Parliament, whereas in the case of the latter it could further be implied from some general constitutional limitation upon the powers of the Parliament. It was also pointed out that the greater number of powers under which the States could be the subject of special burdens or disabilities contemplated legislation of general application.

Coming back to s.96 of the Constitution, the matter with which the power conferred by that section is concerned relates to financial assistance to be given by the Commonwealth to the States. It is provided in terms which do not contemplate a law of general application, and there is nothing in it which would enable the making of a coercive law. "It is but a power", said Dixon C.J., "to make grants of money and to impose conditions on the grant, there being no power of course to compel acceptance of the grant and

1 Perhaps even in the case of the former it may not be impossible to imagine a situation where a law may restrict or control the exercise of constitutional functions of a State. For example, a federal law which provides that no steamship licensed under a State law would be permitted to use lighthouse facilities provided by the Commonwealth unless a certain sum, not demanded from other users, is paid by the owner of the steamship, may be an interference with the exercise of the powers of a State.
with it the accompanying term or condition."\(^1\). This sort of power is not subject to restrictions which, as explained above, are implied either from some conception of the purpose or from some general constitutional limitations based upon the federal nature of the Constitution. Those restrictions may not be difficult to be perceived in the case of coercive powers, that is those demanding obedience, but no law under s.96 could infringe them because it is never compulsive in its operation. Thus the argument based upon implied constitutional limitations interfering with the exercise of constitutional functions of the States would fail so far as a federal law deals with financial assistance to the States.

However, the utmost that could be done as an exercise of the power conferred by s.96 is to supply the inducement to comply with the terms and conditions attached to the grants. If the States do not want grants offered to them, they will not take them. They cannot be forced to accept them "for the essence of an exercise of that power must be a grant of money or its equivalent and beyond that the legislature can go no further than attaching conditions to the grant"\(^2\). So far as conditions attached to a grant are

\(^1\) (1958) 99 C.L.R. 545, at p. 605.
concerned, the nature of the conditions is not justiciable because there is nothing in the Constitution indicating any limitation upon them. Moreover, one cannot spell out of the subject-matter any criteria for limiting the kinds of conditions. It may thus be readily seen that the possibility of the applicability of the rule in Barger's Case is also ruled out because the question of doing indirectly arises only when something could not be done directly under the power under consideration.

But it does not mean that the use of s.96 is without any limits whatever. For example, there might be a possible colourable use of s.96 if a law gave no assistance to the State as a body politic but used it only as a conduit or an agency by which the moneys would be distributed among a class of persons in order to fulfil some purpose pursued by the Commonwealth, and one outside its power to effect directly. Dixon C.J. remarked that he would himself find it difficult to accept that doctrine in full and carry it into logical effect.¹

V

The defence power, as provided in s.51 (vi)² of the

¹(1958) 99 C.L.R. 575, at p. 607.
²It provides: "The naval and military defence of the Commonwealth and of several States ...".
Constitution, is a conspicuous example in the sense that unlike most other powers, it involves the notion of purpose or object. The nature of this difference was explained by Dixon J. in Stenhouse v. Coleman\(^1\), thus:

In most of the paragraphs of s.51 the subject of the power is described either by reference to a class of legal, commercial, economic or social transaction or activity (as trade and commerce, banking, marriage), or by specifying some class of public service (as postal installations, lighthouses), or undertaking or operation (as railway construction with the consent of a State), or by naming a recognised category of legislation (as taxation, bankruptcy). In such cases it is usual, when the validity of legislation is in question, to consider whether the legislation operates upon or affects the subject-matter, or in the last case answers the description, and to disregard purpose or object ... But a law with respect to the defence of the Commonwealth is an expression which seems rather to treat defence or war as the purpose to which the legislation must be addressed.

He was of the view that the 'purpose' approach was implied within the defence power as any connection of the regulation with defence could scarcely be other than purposive\(^2\), though Starke J. preferred to follow a different approach and treated it the same way as any other power by inquiring as to what subject-matter in substance a law or regulation in question related. However it is the

\(^1\) (1944) 69 C.L.R. 457, at p. 471.

\(^2\) See also Commissioner of Taxation v. Moran (1939) 61 C.L.R. 735, at p. 760, per Latham C.J.: "If power is not defined by reference to purpose, the element of purpose is irrelevant".
'purpose' approach that prevailed in the High Court¹. Accordingly the operation of the defence power is conditioned for defence purposes, and the Commonwealth Parliament may not achieve purposes other than defence purposes under cover of the defence power. Here is thus a potentially fruitful area for the application of our maxim.

Then the question arises as to the meaning of defence purposes so as to enable the Commonwealth Parliament to make a law valid under the defence power. It was first enunciated in *Farey v. Burvett*², where a Commonwealth regulation fixing the maximum price of bread was upheld as conducive to the efficiency of the fighting forces. The basis of the decision was underlined in a statement of *Isaacs J.*, that a measure would be authorised under the defence power if it might "conceivably ... even incidentally aid the effectuation of the power of defence"³. The defence power was thus susceptible to a very wide interpretation and in fact it has been used to obtain almost complete

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² (1916) 21 C.L.R. 433.

³ Ibid., at p. 455; see also at p. 444 per *Griffith C.J.*, at pp. 448-9 per *Barton J.*, and at p. 460 per *Higgins J.*
control over the lives of the people during war-times\(^1\).

Though Isaacs J.'s formula was accepted by all the members of the High Court, with the exception of Starke J., during the second world war as the basis to determine the validity of a law professed to be made under the defence power, there has been considerable difference of opinion as to its actual application\(^2\). However, there was unanimity to the extent that the defence power was not without limits whatever and in order that a law might be validly enacted under that power there must be some connection between the law in question and defence purposes. But all of them introduced the conception of 'reasonableness\(^3\). This conception hardly made the connection clear or intelligible so as to formulate or predict any test or criterion. The fact is that it is not possible to state any clear legal test or criterion for war creates all sorts of problems and

1 Refer to cases cited by Menzies, \textit{loc. cit.}, at p. 134.
2 See Sawer, \textit{loc. cit.}, at pp. 297, 298.
because of their diversity and complexity in character it would be difficult to assess which of them are related to defence purposes. The difficulty is enhanced by further problems of degrees of connection and causation. Thus, as observed by Dixon J., "the solution of the question is bound to depend much less upon the abstract formulation of the general test or criteria to be applied than upon a correct ascertainment of the true nature and operations of the provisions impugned and of their bearing upon the prosecution of the war"\(^1\). But even the correct ascertainment of some connection between a law in question and the prosecution of the war is uncertain because of the difficulties in producing evidence of facts of which the Court may take judicial notice. Thus it is a matter of opinion as to the question of degrees of connection which is rather inferential (or speculative) depending upon how one feels or attaches importance to some measure as an aid to further defence purposes than of an abstract formulation of a general test or criterion to be applied to a particular situation.

Differences of opinion occurring frequently in the High Court illustrate this view. In the First Uniform Tax Case, the High Court by a majority consisting of Rich, \(^1\)Stenhouse v. Coleman, supra, at p. 469.
McTiernan and Williams JJ., Latham C.J. and Starke J. dissenting, held that the Income Tax (War-Time Arrangements) Act, which enabled the Commonwealth to take over from the States their officers, premises and equipment concerned with the assessment and collection of income tax, and provided for the transfer from the States to the Commonwealth of records relating to Commonwealth income tax, was a valid exercise of the defence power. The view of the minority was no doubt influenced by the consideration that if the Act was held valid, the Commonwealth could use the defence power for ends inconsistent with the exercise of constitutional functions of the States. But in *R. v. University of Sydney*¹, it was held that Reg. 16 of the National Security (Universities Commission) Regulations, purporting to make provision for the control of admission to universities, was not within the defence power and was invalid. But Latham C.J., with whom McTiernan J. joined hands this time, was again in the minority, whereas Rich and Williams JJ., along with Starke J., constituted the majority. Latham C.J. thought that the Regulations had a

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direct relation to the maximum utilisation of the man­
power of Australia. On the other hand, the majority
held a contrary view and rested its decision on the ground
that the general control of education in the schools and
universities of Australia was outside the scope of the
defence power.

Whereas dicta in cases of the first World War sugges­
ted that the defence power might be almost without limits,
second War cases suggested several limitations. For
example, under the guise of acting under that power, the
Commonwealth may not take over State governmental admin­
istration so as to abolish the federal system of govern­
ment established under the Constitution^1. In the Public
Service Case^2, it was held unanimously that the National
Security (Supplementary) Regulations, in so far as they
purported to control the holidays and remuneration of
members of the public service of Victoria who were not
engaged in work associated with the prosecution of the war,
were not within the ambit of the defence power. Latham
C.J., Rich, McTiernan and Williams JJ., were of the view

1 Refer also to Dixon J. in Melbourne Corporation v. Comm­
onwealth (the State Banking Case), supra.
2 (1942) 66 C.L.R. 488.
that there was no (or no reasonable) connection between the Regulations and defence purposes, and unless it was so the Regulations could not be supported under the defence power. Starke J., of course, applied the test of *pith and substance* and had no difficulty in reaching that conclusion. However, Latham C.J. and Starke J. also seemed to have based their opinions upon an implication drawn from the federal nature of the Constitution in order to restrict Commonwealth interference with State instrumentalities. Another illustration is provided by *Victorian Chamber of Manufactures v. Commonwealth*\(^1\), where it was held that the National Security (Industrial Lighting) Regulations were not authorised by the National Security Act 1939-40, and were beyond the defence power. There is some logical difficulty in accepting the decision in that case\(^2\), but it does show that under the colour of the defence power the Commonwealth may not trench *unduly* upon the jurisdiction of the States.

During the two world wars, many regulations were held valid, the operation of which depended upon the opinion of a Minister that certain action was necessary or expedient

\(^1\) (1943) 67 C.L.R. 413 (the *Industrial Lighting Case*).

\(^2\) See Sawer, *loc.cit.*, at p. 299.
in the interests of defence or the prosecution of the war\(^1\),
though there were dicta also suggesting that a law might
become invalid on grounds of constructive bad faith in the
sense of "arbitrariness" or "capriciousness\(^2\). But that
was because the regulations were construed as relating to
a subject which fell within the defence power during
hostilities. The effect of the regulations was therefore
to limit the discretion conferred upon the Executive by
reference to defence purposes. For example, in _Shrimpton v. Commonwealth_\(^3\), a question arose as to the validity of
the National Security (Economic Organization) Regulations.
The regulations prohibited the purchase of land without
the consent of the Treasurer, and gave the Treasurer an
absolute discretion to refuse consent or to grant it
either unconditionally or subject to such conditions as he
thought fit. A person applied to the Treasurer for his
consent to a transaction for the purchase of land, but the
Treasurer was willing to give his consent upon condition


\(^2\) See e.g. Starke J. in the _Case of Jehovah's Witnesses_, _supra_, at p. 151; Rich J. in the _Industrial Lighting Case_, _supra_, at p. 419; cf. McTiernan J. in the _Women's Employment Board Case_, _supra_, at p. 384.

\(^3\) (1945) 69 C.L.R. 613.
that the purchaser should deposit in her bank security of a certain value. The plaintiff challenged the validity of the Regulations as well as the action of the Treasurer. As to the Regulations, the Court upheld their validity in a curious way: Rich and Williams JJ. considered them to be invalid; Latham C.J. and McTiernan J. were of the opinion that they were valid; Starke J. expressed no opinion; and Dixon J. was not prepared to say that they were beyond the defence power. However, the Regulations were so construed that the limits of the authority would be exceeded if the Treasurer exercised his discretion to impose a condition having no relation to matters affecting the defence of the country or the prosecution of the war. Applying this criterion, Latham C.J., Starke, Dixon and McTiernan JJ. held that the condition imposed by the Treasurer went beyond the purpose for which the discretion was conferred upon him and, accordingly, was not authorised by the Regulations. The discretion which the Treasurer was entitled to exercise, though described as absolute, was, in Latham C.J.'s opinion, not arbitrary and unlimited; it must be exercised bona fide and for the purpose of the Regulations

1 Ibid., at pp. 619, 620.
The defence power does not cease to be effective instantaneously with the cessation of war and continues to operate not only in the transition period from war to peace\(^1\), but also in times of peace\(^2\), so long as it can be shown that a particular measure or control is desirable or possibly necessary for defence purposes. Its operation must then be determined by reference to the exigencies that attend the cessation of war or the demands that call for the preparation of war rather than the need of sustaining the hostilities. However, the connection between a law in question and defence purposes must be *reasonable*\(^3\), and the problem is still primarily one of degree upon which opinion may differ\(^4\), and the remoteness

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\(^2\) Marcus Clark & Co. Ltd v. Commonwealth (1952) 87 C.L.R. 177.


\(^4\) It is typically illustrated by Dawson v. Commonwealth (1946) 73 C.L.R. 157; the Chief Justice and two other Justices were of the opinion that the regulations in question were valid whilst the remaining three considered them invalid; as the Court was equally divided the judgment followed the opinion of the Chief Justice.
or proximity of the effects which a law is likely to produce would depend upon the nature of the subject for legislation and the existing circumstances varying in time and place.

It is true that the defence power enabled the Commonwealth Parliament to deal with exigencies for the change back from war conditions to an order proper to peace. At the same time, it is limited in its operation so as not to be used as an indirect means to achieve virtual unification or to disregard the federal nature of the Constitution. For a war measure dealing with a subject otherwise falling within the exclusive province of the States to be continued after the cessation of hostilities, the Court must see with reasonable clearness how it was incidental to the defence power to prolong its measure and unless it could do so it was the duty of the Court to pronounce the enactment beyond the defence power. It was one thing, pointed out

For example, in 1946 control on the sale of cars was held as not justified in *Crouch v. Commonwealth* (1948) 77 C.L.R. 339, whereas in 1949 a conviction was upheld in relation to a dealing in land which occurred in 1947 in *Hume v. Higgins* (1949) 78 C.L.R. 116. Similarly in 1935 the establishment of a clothing factory on a commercial basis was upheld in *Attorney-General for Victoria v. Commonwealth* (1935) 52 C.L.R. 533, whereas in 1926 the Board constituted by the Commonwealth Shipping Act to carry on engineering establishments was not authorised to enter into agreements to supply turbo-alternators in *Commonwealth v. The Australian Commonwealth Shipping Board* (1926) 39 C.L.R. 1.
Dixon J., to treat the defence power as extending to matters which were incidental so to speak to winding up the war; it was an entirely different thing to assert authority over things connected with the war only as a matter of causation or history. In *R. v. Foster*, the High Court unanimously held that none of the Regulations, i.e. the Women's Employment Regulations, the Liquid Fuel Regulations and Regulations 30A to 30AF of the War Service Moratorium Regulations, could be supported under the defence power. In each case they were sought to be continued in force for the purpose of dealing with circumstances which could be regarded merely as consequences of war.

"If it were held", Dixon C.J. said, "that the defence power would justify any legislation at any time which dealt with

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2 (1949) 79 C.L.R. 43.
3 These provided for the remuneration and working conditions of female employees in war industries and in essential civilian employment. During the war the regulations were held valid in *Victorian Chamber of Manufactures v. Commonwealth* (the Women's Employment Board Case), supra.
4 These provided for the rationing of liquid fuel throughout Australia.
5 These provided that a protected person might obtain a warrant of possession authorising him to occupy a dwelling house. Their continuance immediately after the war was upheld in *Real Estate Institute of New South Wales v. Blair* (1946) 73 C.L.R. 213.
any matter the character of which had been changed by the war, or with any problem which had been created or aggravated by the war, then the result would be that the Commonwealth Parliament would have a general power of making laws for the peace, order and good government of Australia with respect to almost every subject.

It is seen that the defence power has a fixed conception with a changing content varying from time to time, and for its valid operation or application there must be the necessary connection between a law in question and the defence of the Commonwealth. There are two more matters of fundamental importance that came up for discussion in *Australian Communist Party v. Commonwealth*\(^1\). Firstly the necessary connection of a law with defence or a capacity to assist defence must be perceived in what the law does and not in what will follow when it does it. Secondly, recitals in an Act are not decisive of the validity or invalidity of the Act for that is a question to be decided by the courts finally and conclusively; the Commonwealth Parliament cannot "recite itself" into power. In the *Communist Party Case*\(^2\), it was held by the High Court,

\(^1\) (1951) 83 C.L.R. 1 (the *Communist Party Case*).

Latham C.J. dissenting, that the Communist Party Dissolution Act 1950\(^1\), proscribing the Communist Party eo nomine and incapacitating communists from certain employments, could not be sustained under the defence power. The recitals\(^2\) in the preamble to the Act were matters upon which the Commonwealth Parliament could legislate under the defence power whether in peace or in war; but the question turned as to the examination of the provisions actually enacted. All members of the Court who formed the majority

\(^1\) The important sections are 4, 5 and 9. S.4 declares the Australian Communist Party to be an unlawful association, dissolves it, and provides for the vesting of its property in a receiver; s.5 provides that where the Governor-General is satisfied that a body of persons is a body of persons, corporate or incorporate, which is dominated by communists or communist doctrine, and that the continued existence of that body of persons would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth, the Governor-General may declare that body of persons to be an unlawful association; and s.9 provides that where the Governor-General is satisfied that a person is a person, who is or was for a certain time a communist, and that that person is engaged or is likely to engage in activities prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth, the Governor-General may make a declaration accordingly.

\(^2\) The aims and activities asserted in these recitals include the overthrow of established government in Australia by means of force, violence, intimidation and fraudulent practices, espionage and sabotage, and deliberate dislocation, disruption and reduction and retardation of production in industries vital to the security and defence of Australia.
were of the view that the mere opinion of the Parliament was not sufficient to establish the necessary connection between the legislation and defence purposes. Dixon, McTiernan, Williams, Fullagar and Kitto JJ. were in substantial agreement that the recitals could hardly be made the subject of proof or disproof by evidence in the ordinary way as they related to a particular association and no specific act or fact was asserted; the Act afforded no objective test by reference to which the Court could judge whether its provisions were referable to the defence power; and therefore it would be impossible to say anything about its supposed connection with the defence power. McTiernan J. also thought that it would have been better if the Court had had the guidance of a formal statement made by the Executive Government of its appreciation of the international situation. Webb J. followed altogether a different approach and was of the view that the question of the validity or invalidity of the Act depended upon the judicial determination of the facts without any limitation by the recitals, and the plaintiffs were entitled to adduce evidence to establish their point of view; however, in the absence of any evidence on that issue the Act failed. The legal position was summarised by Professor Beasley thus:
The judgment of the High Court (apart from the dissenting opinion of Latham C.J.) appears to be based largely on the proposition that, except in time of actual war or of national emergency (the existence of the latter depending upon judicial notice or denial of it), legislative power as to unincorporated voluntary associations is vested in the States. The constitutions of the States, like that of the Commonwealth, contain no guarantees of, for example, freedom of speech, freedom of association, immunity from forfeiture except by due process of law. Hence what cannot at the moment be done directly by Commonwealth legislation could be done in other ways: (a) by all States passing legislation identical in substance or form to outlaw the Australian Communist Party within their respective areas; or (b) by all States referring this power to the Commonwealth Parliament under section 51 (xxxvii) of the Constitution.

Fullagar J. explained that because of its 'purposive' nature the defence power had two aspects. In its primary aspect it authorised the making of laws which had, as their direct and immediate object, the naval and military defence of the Commonwealth, e.g., the enlistment and training and equipment of men and women, the provision of ships and ammunitions, the manufacture of weapons etc. In its secondary aspect it authorised the making of laws which related to matters not normally regarded as having any connection with defence, e.g., the price control and rationing of goods, rent and eviction of tenants, the transfer of interests in land, and the conditions of

1 Loc.cit., at p. 513.
employment generally. The matters falling within the primary aspect were *ex facie* connected with defence purposes, but in case of those falling within the secondary aspect, the necessary connection would depend upon basic facts which gave rise to the extension of the power; such facts had always hitherto been matters of public general knowledge and matters, therefore, of which a court could and would take judicial notice. Thus in determining the validity of a law with respect to a matter falling within the secondary aspect there were two stages: (i) the existence of war or national emergency or such other exigency and its recognition as bringing into play the secondary or extended aspect of the power by judicial notice which provided a presumption of validity not in existence otherwise, and (ii) the examination of the law with regard to its character as a step to assist in dealing with the emergency. The question at the second stage might turn on particular facts as distinct from overriding general fact of war or emergency or exigency. Coming to the Act itself, the most conspicuous feature of the Act was that it did not purport to impose duties or confer rights or prohibit acts or omissions, but purported simply to declare the Communist Party unlawful and to dissolve it. In such a case there could be no presumption of validity for the simple reason
that there would be no presumption that the Communist Party had done or was likely to do anything which could bring it within the defence power. As to the position affected by the recitals contained in the preamble, he thought that it would be impossible to allow them conclusive force because the Parliament could not recite itself into a field, the gates of which were locked against it by the Constitution. Thus the Act could only be supported, if at all, as an exercise of the defence power in its extended or secondary aspect which must depend upon judicial notice of an emergency, but there was hardly any matter worth judicial notice so as to bring the secondary aspect into operation.

The first aspect of the defence power has often been availed of by the Commonwealth as well as in peace as in war, but its secondary aspect has been regarded as only coming into operation in time of war, and the period necessary for post-war readjustment$. However, there were dicta in earlier cases$ and it was implicit in some of the opinions in the Communist Party Case$ that the secondary

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1. See Australian Communist Party v. Commonwealth, supra, at p.254 per Fullagar J.

2. E.g., Farey v. Burvett, supra, at p.441; R. v. Foster, supra, at p. 81.

3. Supra, at p. 195 per Dixon J., at p.225 per Williams J., and at p. 274 per Kitto J.
aspect might come into operation even in a situation falling short of war. It was firmly established in Marcus Clark & Co. Ltd. v. Commonwealth\(^1\), where the High Court upheld the validity of the Defence Preparations Act 1951, and the regulations made thereunder, restricting the issue of share capital. The Court, in contrast to its experience of the Communist Party Dissolution Act, found in the Act objective tests by which it could judge that the provisions in question had the necessary connection with the defence of Australia. The objectivity of the tests was provided by references to circumstances warranting defence preparations at that time. As to the justification of the restriction on the issue of share capital, the Constitution did not expressly exclude economic and financial controls from the means which the Commonwealth Parliament might, in times of peace, provide for the purpose of preparing the country to resist aggression and to meet the possible dangers and adversities that might overtake Australia under modern conditions of war. It is true that in considering the operation of the defence power the distinction between a period of actual hostilities and a period of apprehended danger short of war could never be disregarded, but the restrictions imposed by the regulations were auxiliary to \(^1\)(1952) 87 C.L.R. 177 (the Capital Issues Case).
and consequential upon the diversion of tangible and intangible resources to warlike purposes, and such a diversion might be made under the threat of war as well as when actually engaged in the war. As to the argument that the Commonwealth could not, by taking steps which were within power, achieve the result of extending the ambit of its power, Fullagar J. replied that as the gravity of the situation increased, the scope of what was complementary to the defence power must become progressively enlarged, and the reactions of measures taken must often call for control or modification by other measures. However, the possibility that the legislature will be found achieving something "indirectly" increases proportionately as the operation of the defence power contracts according to the change in circumstances from the period of war to the establishment of peace, and in times of peace the chances are the most.

It may also be noticed that the validity of a law with respect to defence is closely related to the question of whether and what evidence is admissible to establish the necessary connection between an emergency dealt with and the defence purposes. This matter was dealt with more fully by Fullagar J. in the Communist Party Case. According

\[\text{Ibid.}, \text{ at p. 255.}\]
to him matters falling within the first aspect of the defence power create no problem as they are *ex facie* connected with defence. But for matters falling within the secondary aspect of the power, the problem may arise at two levels. Firstly, the existence of some emergency is to be recognised (connected with the international situation) so as to bring into operation that extended or secondary aspect of the power, and it could be done only as a matter of judicial notice. It is only after the fulfilment of this requirement that the court would pass on to the question of admissibility of evidence at the second level. In the *Communist Party Case*, nothing could be judicially noticed as to the conduct or objectives of the individuals who constituted the Communist Party, whereas in the *Capital Issues Case* the international situation warranting preparation of war on the scale authorised by the Defence Preparations Act was a matter to be judicially noticed.

After the existence of the secondary aspect has been established by judicial notice of an emergency, evidence at the second level is admitted to connect the law in question with the defence power. Whether and what evidence is admissible depends on the circumstances of each particular

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_Dixon J._ might not accept this restriction: the *Communist Party Case*, *supra*. 
case. In Jenkins v. Commonwealth\(^1\), where the National Security (Mineral) Regulations which provided for the acquisition of mica compulsorily were held not beyond the defence power notwithstanding that two years had elapsed after the cessation of hostilities, the circumstances that were noticed were the necessity of building up an adequate reserve for defence forces especially in view of the conditions in India and the consideration that the Parliament and the Executive must be afforded a reasonable period during the transition from hostilities to peace to consider whether legislation within the constitutional powers of the Commonwealth in normal times was required to replace the existing regulations. In Sloan v. Pollard\(^2\), the continuance of an order restricting the use and sale of cream made under the National Security (Food Control) Regulations was held to be justified on the ground that its object was to increase exportable surplus of butter and cheese which was necessitated by the fulfilment of an agreement between the Commonwealth and the United Kingdom during the war. And in the Capital Issues Case the circumstances for the justification of the regulations imposing restrictions on the issue of share capital were that the execution of a

\(^1\)(1947) 74 C.L.R. 400.

\(^2\)(1947) 75 C.L.R. 445.
substantial defence programme at that time was quite likely to bring about economic strains and dislocations of such a nature that, unless they could be controlled by the authority constitutionally responsible for defence, the defence programme itself might be imperilled or impeded.

Even at the second level the court would normally confine itself to matters of which judicial notice could be taken, and thus it must depend upon matters of general public knowledge. This is so because (a) the taking of evidence might often involve disclosures which would be prejudicial to the steps being taken by the Executive to deal with the emergency, (b) the court is bound by the legal rules of evidence, and there are thus limitations upon the material it could receive, and (c) the facts might in many cases be of such a general character as to be difficult or impossible to prove or disprove by legally admissible evidence, while quite capable of being judicially noticed. Thus the entire process is so flexible as to prevent formulation of any criterion or test from which may be deduced the degree of connection for the validity of a law. However, there seems to be clarity

1 Stenhouse v. Coleman, supra, at pp. 469, 470; Australian Communist Party v. Commonwealth, supra, at p. 256. See also R. v. Foster, supra, at pp. 51, 52; Holmes, Evidence in Constitutional Cases (1949-50) 23 Aust.L.J. 235.
on two points. Firstly, it is not the Executive or the Parliament, but the Court whose opinion would be final, though ordinarily the court would not substitute its opinion for that of the Executive or the Parliament. Secondly, the possibility of some extrinsic purpose or ulterior motive in the minds of the Parliament or the Governor-General could not be investigated by a court.

The most interesting example of reliance on the peacetime defence power for a project only doubtfully within federal defence power is the Snowy Mountains Hydro-Electric Power Act 1949-58. The preamble to the Act stresses the defence power as the basis of the federal action, partly in deliberate reliance on Ashwander v. Tennessee Valley


Stenhouse v. Coleman, supra, at p. 471, per Dixon J.; the Communist Party Case, supra, at p. 254, per Fullagar J.

The Snowy Mountains Scheme is a vast engineering project by which the snow-fed waters of the Australian Alps will be diverted westwards through transmountain tunnels under the Great Dividing Range to the dry plain of the inland. These waters will be used for generating huge quantities of power. Funds for the scheme are being provided by the Commonwealth Government. Payment of interest and repayment of capital are being financed by the sale of electricity to the consumer States of New South Wales and Victoria.
Authority. Actually, the Snowy Mountains Authority constituted under the Act is mainly concerned with water conservation and electric power generation for general agricultural and industrial purposes, having no specific relation to defence. Probably the Commonwealth would also have relied on the spending power if necessary, but would have faced the difficulties under that power mentioned above. In fact the Commonwealth felt so doubtful about its constitutional position that it went to considerable lengths to avoid giving any private person occasion for challenging the Authority's activities, and tried for many years to obtain State authorisation for the activities of the Authority; the States concerned, New South Wales and Victoria, derived so much benefit that they did not take any action to challenge its validity, and finally in 1958 those States passed Acts\(^2\) giving support of State constitutional power - undoubtedly sufficient for the purpose - to the somewhat shaky legal structure of the Snowy Mountains Authority.

VI

The maxim under review was also cited in relation to the operation of s.109 of the Constitution in Clyde\(^1\) (1935) 297 U.S. 288; the Supreme Court of the United States held that the Tennessee Valley Authority might be authorised to sell its surplus water in peace-time. Also refer to Attorney-General for Victoria v. Commonwealth (1935) 52 C.L.R. 533.

\(^1\) Snowy Mountains Hydro-Electric Agreements Act 1958 (N.S.W.); Snowy Mountains Hydro-Electric Agreements Act 1958 (Vic.).
Engineering Co. Ltd. v. Cowburn\(^1\). An award made under the Commonwealth Conciliation and Arbitration Act prescribed rates of pay and overtime based on a working week of forty-eight hours. A later Act of New South Wales entitled the Forty-four Hours Week Act purporting to apply to persons bound by the Commonwealth award prescribed a working week of forty-four hours and made a provision for the adjustment of rates of pay and overtime accordingly. Cowburn relying on the State law, sued for a working week of forty-four hours only. The High Court held that when an award had been made under the Commonwealth Act, the parliament of a State could not alter the terms of an award or confer or impose on the parties to it rights or obligations which were inconsistent with such terms. "No State law can in the presence of s. 109 of the Constitution", said Isaacs J., "be permitted to stand in the way of settlement so authorized or directed. No State law can prevent that settlement by direct prohibition, either wholly or partly. And what it cannot do directly it cannot do indirectly"\(^2\).

\(^1\)(1926) 37 C.L.R. 466.

\(^2\)Ibid., at p. 491. In Federated Saw Mills & Co. Employees Association of Australia v. James Moore & Sons Pty Ltd. (1909) 8 C.L.R. 465 (the Saw Mills Case), and Australian Boot Trade Employees Federation v. Whybrow & Co. (1910) 10 C.L.R. 266 (the Whybrow Case), it was held that a Commonwealth decision could not override a State law. Later in Federated Engine-Divers and Firemens Association of Australasia v. Adelaide Chemical and Fertilizer Co. (1920) 28 C.L.R. 1 (the Engine Drivers Case), it was held that since both could be obeyed by employment at the lower minimum, both the laws were valid.
Actually, there have been no other Australian examples of attempts to *evade* the subordination of State law involved in s.109, and the expressions used by Isaacs J. in Cowburn’s Case were unnecessarily rhetorical – the State laws on industrial relations had never been passed in order to defeat a federal law, but on a view having a good deal of earlier support that they were valid unless directly in conflict with the duties of obedience required by federal law. No situation comparable with the laws of southern United States requiring the closing of schools and universities faced with federally-required racial integration has arisen, though it might have done if the attempt of the New South Wales government under J.T. Lang (Premier, 1925-1927 and 1930-1932) to defy federal financial policy had gone further.

VII

In conclusion, it may be said that whenever the validity of a law, whether Commonwealth or State, was in dispute, it has always been in the minds of judges to notice, wherever possible, before giving the final verdict,

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See *New South Wales v. Commonwealth* (1931) 46 C.L.R. 155; 46 C.L.R. 235; 46 C.L.R. 246. (The Garnishee Cases). For a detailed account of the story see Evatt, *The King and His Dominion Governors* (1936), Ch.XIX.
whether there was any attempt to do indirectly what could not be done directly. It is true that the maxim had ups and downs in the constitutional development in Australia, but nowhere was it suggested that its application has fallen into disuse. The ups and downs were mainly due to the changes in the technique of interpretation, particularly before and after the Engineers' Case. But much depends on what a particular legislative power is understood to mean.

The maxim has had especially fruitful Australian application in the sphere of constitutional prohibitions and legislative schemes, which are further discussed elsewhere, and of which the Homebush Flour Case and the Uniform Tax Cases provide examples. Such problems can always be considered as a projection of the "single statute" types of case mainly considered in this chapter, and indeed the High Court of Australia is certain when deciding a "legislative scheme" case before it to be influenced more by the authorities mentioned above than by comparative "legislative scheme" studies drawing on other countries. But for the purpose of this thesis it was thought desirable to assemble Australian and other "legislative scheme" cases elsewhere, since some analytical features of the problems caused by "legislative schemes" in relation to constitutional problems are brought out better in a comparative treatment.
CHAPTER V

South Africa

South Africa has a unitary Constitution\(^1\), an Act of the British Parliament, which formally contains no limitations or restrictions on the law-making powers of the Union Parliament such as those provided in the United States, Canadian and Australian Constitutions. The Union Parliament has full powers to make laws for the peace, order and good government of the Union\(^2\) and ordinarily it functions bi-camerally\(^3\) (requiring action by a simple majority of each House sitting separately), but problems akin to those of the federal constitutions have arisen from the cases excepted by s.35 and s.152, known as the 'entrenched clauses'. S.35 relates to franchise in the Cape Colony and provides that a person who is capable,

\(^1\) South Africa Act, 1909.
\(^2\) S.59 of the South Africa Act.
\(^3\) In case the two Houses do not agree, it is provided under s.63 of the Act that the Governor-General may convene a joint sitting of both Houses and if the Bill is affirmed by a majority of the members of both Houses present at such sitting, it shall be taken to have been duly passed by both Houses of Parliament.
or who might become capable, of being registered as a voter in the Cape Colony should not be disqualified from being so registered by reason of his race or colour only unless a Bill embodying such a provision "be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses". In s.152 is provided an express prohibition against a repeal or alteration of any part of s.35, and of s.137 which guarantees the equal status of English and Dutch as the official languages of the Union, together with a repeal or alteration to any part of s.152 itself "unless the Bill for such repeal or alteration shall be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses".

After the passing of the Statute of Westminster 1931¹ there was uncertainty as to the impact of the Statute upon the operation of s.35 and s.152 of the South Africa

¹ For its general discussion see Wheare, The Statute of Westminster and Dominion Status (5th ed.); Latham, The Law and the Commonwealth (1937); Keith, The Constitutional Law of the British Dominions (1933); The Dominions as Sovereign States (1938); Jennings, The Law and the Constitution (3rd ed.), Ch.IV.
Act. The Statute contained no express provision repealing or altering those sections, and yet it could be so implied from s.2(2)\(^1\) of the Statute. In effect, the problem raised was of a bigger magnitude involving the meaning of the concept of *Dominion status*\(^2\) and *sovereignty of Parliament*. The problem has been examined many times\(^2\), but here an endeavour is made (though at the cost of repetition) to emphasise the conflict between Parliament and the courts and to recognise how far the courts have asserted an authority to review the actions of the Union Parliament, particularly in view of the maxim

\(^1\) It provides: "No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation insofar as the same is part of the law of the Dominion".

*what cannot be done directly cannot be done indirectly*, so as to preserve the sanctity of the *entrenched clauses* in South Africa.

II

The Union Parliament, unlike the British Parliament, was created by legislation, and the two Houses of Parliament were established by the South Africa Act and derived their powers from that Act. After the passing of the Statute of Westminster, a question of constitutional importance arose whether the *entrenched clauses* of the South Africa Act were still entrenched, or whether the Union Parliament was, as a consequence of the *sovereignty of Parliament*, no longer subject to the limitations imposed by the *entrenched clauses* and free to amend any section of the South Africa Act, even although such a section might originally have been entrenched. This question was considered for the first time in Ndlwana v. Hofmeyr, N.O., which involved an action by a native

1 Prior to the passing of the Statute of Westminster, the procedure prescribed by the *entrenched clauses* was undisputably obligatory, and in R. v. Ndobe (1930) A.D. 484, the South African Court of Appeal had specifically rejected an argument that the Courts of law had no jurisdiction to inquire into the observance of the *entrenched clauses*.

2 (1937) A.D. 229.
whose voting status was changed under the Representation of Natives Act 1936. The Act provided for the exclusion of the names of natives from the voters' lists which included the names of persons qualified to vote in the Cape Province and in which the natives had up to the passing of the Act been included, and provided for their being included in another list. Though the Act was passed by the Union Parliament in accordance with the procedure prescribed by s.35 of the South Africa Act, it was contended that it was not a law which fell within the provisions of s.35 and, therefore, the procedure prescribed by s.35 should not have been followed. The Cape Provincial Division overruled the objection as the Act contained provisions which were in effect, in the opinion of Judge-President Van Zyl (who spoke for the Court), disqualifying provisions within the meaning of s.35. The Judge-President, however, went on to say that the effect of the passing of the Statute of Westminster was to withdraw from the Union the sovereignty of the United Kingdom and to make the Union Parliament the sovereign legislature in the Union with power to repeal or amend any British Act, including the South Africa Act, so far as it was  

1 Act No. 12 of 1936 (South Africa).
part of the law of the Union. On appeal the Appellate Division affirmed the decision of the Cape Provincial Division. **Stratford, A.C.J.**, (the other members of the Court concurring), arrived at his conclusion assuming the Union Parliament to be the supreme and sovereign law-making body and equal in status to the Imperial Parliament since the passing of the Statute of Westminster.

The Acting Chief Justice said:

Parliament's will, therefore, as expressed in an Act of Parliament cannot now in this country, as it cannot in England, be questioned by a Court of law whose function it is to enforce that will, not to question it. ... It is obviously senseless to speak of an Act of a sovereign law-making body as ultra vires. ... Now, assuming that we are entitled to infer from its reference to the two provisions of s.35 that Act 12 of 1936 was passed by the two Houses sitting together and not bicamerally the question then is whether a Court of law can declare that a sovereign Parliament cannot validly pronounce its will unless it adopts a certain procedure - in this case a procedure impliedly indicated as usual in the South Africa Act? The answer is that Parliament, composed of its three constituent elements, can adopt any procedure it thinks fit; the procedure express or implied in the South Africa Act is so far as Courts of law are concerned at the mercy of Parliament like everything else.\(^1\)

These observations so far as a matter of application to Acts generally might possibly be regarded as merely a strong dictum, as the Act involved was an Act contemplated

\(^1\) *Ibid.*, at pp. 229, 230, 231 (Italics supplied).
by s.35 of the South Africa Act – it was passed by the two Houses sitting together and by a two-thirds vote.

However, the question came up squarely before the Appellate Division in Harris v. Minister of the Interior¹, where the actual question in issue was whether the Separate Representation of Voters Act, 1951², was in whole, or in part, enforceable in a Court of law. The Act provided for the separate representation of European and non-European voters in the Cape Province. In effect, a non-European who was immediately prior to the passing of the Act, entitled to vote in the same constituency as a white person, was debarred from doing so on the ground of his colour or race. It was clear that the Act had been passed bicamerally and not unicamerally as contemplated by s.35 and s.152 of the South Africa Act. The Act was challenged on the ground that it provided for ‘disqualification’ within the meaning of s.35, and was invalid because it had not been passed in accordance with the procedure prescribed by s.152. The Court accepted this argument and held that the Union Parliament was a sovereign legislature but it had to observe the provisions

¹ [1952(2)] S.A. 428 (A.D.) (the Vote Case).
² Act No. 46 of 1951 (South Africa).
of the South Africa Act, and the Courts of law had power to declare invalid an Act on the ground that it had not been passed in accordance with the mode of legislation prescribed by that Act.

It was contended that the Statute of Westminster had had the effect of repealing or modifying the provisions of s.35 and s.152 of the South Africa Act. Centlivres, C.J., speaking for the Court, first referred to the events which led up to the passing of the Statute and had no difficulty in recognising the continued effectiveness of those sections. As to s.21 of the Colonial Laws Validity Act, 1865, it was said that it could have no application to a repeal or an alteration of the South Africa Act because such repeal or alteration was specifically authorised by s.152 of that Act, which was a later Act than the Colonial Laws Validity Act and must, therefore, in case of conflict, override the earlier Act.

As to the Statute of Westminster, it contained no express repeal of the "entrenched sections." The effect

It provides: "Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the Colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."
of the repeal\(^1\) of the Colonial Laws Validity Act was to remove a fetter on the Union Parliament - inability to pass a law repugnant to a British Act in so far as that Act extended to the Union. And in similar terms was the object of s.2(2) of the Statute which conferred, by necessary implication, powers on the Union Parliament which it did not possess prior to the passing of the Statute, viz., the power to make a law although repugnant to an existing or future enactment of the United Kingdom, the power to make a law having extra-territorial operation, and the termination of the supremacy of the British Parliament in South Africa. But there was nothing in the Statute to suggest, even impliedly, the inference that there was any intention to repeal or modify the *entrenched clauses*\(^2\) of the South Africa Act. The Chief Justice explained:

The words "Parliament of a Dominion" in the Statute of Westminster must, in my opinion, be read, in relation to the Union, in the light of the South Africa Act. It is implicit in that Act that the Parliament of the Union must function bicamerally, save in the cases excepted by secs. 35, 63 and 152.\(^2\) ... It is that Act and not the Statute

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1 See s.2(1) of the Statute of Westminster, 1931, which provides: "The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion."

2 [1952(2)] S.A. 428 (A.D.), at p. 463.
of Westminster which prescribes the manner in which the constituent elements of Parliament must function for the purpose of passing legislation.

Ss. 7 and 8 of the Statute, which provided for saving clauses against any amendment of the Constitution in the case of Canada, Australia and New Zealand but none in relation to the Union of South Africa, was also relied on in support, but they were explained away as being inserted ex majori cantela in order to quiet any fear there might be against misconstruction.

As to the contention that the Union Parliament, in view of the Statute of Westminster, had become the exact

1 Ibid., at p. 464.

2 It provides: "(1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder. (2) The provisions of sec. 2 of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces. (3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces, respectively."

3 It provides: "Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia or New Zealand otherwise than in accordance with the law existing before the commencement of this Act."

4 [1952(2)] S.A. 428 (A.D.), at p. 466.
replica of the British Parliament, it was pointed out that the former having its source in the South Africa Act was different in kind from the latter. For a state to be sovereign it was not necessary that the legislature must be completely sovereign. Legal sovereignty in a state might be divided between two authorities. "In the case of the Union," the Chief Justice continued, "legal sovereignty is or may be divided between Parliament as ordinarily constituted and Parliament as constituted under sec. 63 and the proviso to sec. 152."

In the context of s.4 of the Statute of Westminster, which had by necessary implication been amended by s.2 of the Status of the Union Act, 1934, the Chief Justice reiterated that "To say that the Union is not a sovereign state, simply because its

1 Ibid., at p. 464.

2 It provides: "No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or by deemed to extend, to a Dominion as part of the law of that Dominion unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof."

3 It provides: "The Parliament of the Union shall be the sovereign legislative power in and over the Union, and notwithstanding anything in any other law contained, no Act of the Parliament of the United Kingdom and Northern Ireland passed after the eleventh day of December, 1931, shall extend, or be deemed to extend, to the Union, unless extended thereto by an Act of the Parliament of the Union."
Parliament functioning bicamerally had not the power to amend certain sections of the South Africa Act, is to state a manifest absurdity. Those sections can be amended by Parliament sitting unicamerally."

Attention was then turned on to the consideration of Ndlwana's Case, which was, however, regarded as an authority establishing the Union Parliament as completely sovereign in the sense that it could adopt any procedure which it might choose. The Chief Justice pointed out that the Court in that case did not seem to have applied its mind to the question whether the Statute of Westminster impliedly repealed the entrenched clauses of the South Africa Act. Thus, following the reasoning adopted in the present case, the dicta in Ndlwana's Case were finally, though perhaps reluctantly, dissented from.

III

Immediately after the decision in the Vote Case, the High Court of Parliament Act, 1952, was passed by a simple majority of the two Houses of the Union Parliament sitting separately. The purpose of this Act was to make any

1 [1951(2)] S.A. 428 (A.D.), at p. 468.
2 Act No. 35 of 1952 (South Africa).
judgment or order of the Appellate Division of the Supreme Court, whether given or made before or after the commencement of the Act, which invalidated in whole or part an Act of Parliament, subject to review by a Parliamentary court to be known as the High Court of Parliament\(^1\). The Court was constituted of all members of the two Houses of the Union Parliament\(^2\). It was empowered on any legal ground by resolution to confirm, vary or set aside the judgment or order of the Supreme Court by a simple majority of the members present and voting; and its decision was to be final and binding, and to be executed in every respect as if it were a decision of the Supreme Court\(^3\). The proceedings were to be initiated by a Minister of State who should lodge with the President of the Court an application for the review of a case\(^4\). The actual business was, however, to be conducted by a smaller body to be known as the judicial committee (to which the reference would be made by the President of the Court) consisting of ten members of the Court appointed by

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\(^1\) S.2.
\(^2\) S.3(1).
\(^3\) S.8(1), (2), and (3).
\(^4\) S.5(1).
the President, and the Court would act upon the report of
the Committee, and such recommendations as it might deem
fit to make. It was also provided that no member of the
Court was disqualified from sitting as a member of the
Court or a judicial committee by reason of the fact that
he participated in the proceedings of Parliament in his
capacity as a member of either House during the passing
of the Act of Parliament which formed the subject matter
of the judgment or order under review.

In pursuance of the provisions of the High Court of
Parliament Act, the Prime Minister made an application for
the review of the Vote Case, and the High Court of Parlia-
ment declared that the decision in that case had been
wrong in law. In the meanwhile the successful appellants
in the Vote Case applied to the Cape Provincial Division,
as the Court of the first instance, for, inter alia, an
order declaring that the High Court of Parliament Act was
invalid, null and void and of no legal force and effect.
The Cape Provincial Division granted the order. Then an
appeal was taken to the Appellate Division, which in
\[1\] S.6(1), (2), and (8).
\[2\] S.3(7)(b).
Minister of the Interior v. Harris\(^1\) unanimously confirmed the decision in the Cape Provincial Division. It was held that the Act altered s.152 of the South Africa Act; accordingly, as it was passed bicamerally and not in the manner prescribed by s.152, it was invalid. It was further held that the High Court of Parliament was not a Court of Law such as was envisaged by s.152; nor was it in substance, a Court of Law.

**Centlivres C.J.**, first referred to certain rights conferred on individuals by s.35 and s.137 and their entrenchment by providing a special mode of legislation in s.152, and said that it was the duty of the Courts to protect those rights and make them effective, unless and until they were modified by legislation in such a form as under the Constitution could validly affect such modification. However "it does not, of course, follow", the Chief Justice added, "that Parliament sitting bicamerally is not entitled to amend those sections of the Constitution which deal with the Judiciary, but it cannot in my opinion bicamerally pass any Act, the effect of which would be to render nugatory the rights entrenched in the Constitution"\(^2\). The contention based on the

\(^1\) [1952(4)] S.A. 769 (A.D.) (the *High Court Case*).

\(^2\) Ibid., at p. 780.
distinction between substantive law and adjective or procedural law was also, in his view, insupportable because "to call the rights entrenched in the Constitution constitutional guarantees and at the same time to deny to the holders of those rights any remedy in law would be to reduce the safeguards enshrined in s.152 to nothing"\(^1\).

The Chief Justice then passed on to the question whether the High Court of Parliament Act infringed the provisions of s.152. This question was approached by comparing a Court of Law as envisaged by s.152 with the High Court of Parliament as provided by the Act, to see whether the latter conformed to the requirements of the former. It was found that the High Court of Parliament was an entirely different type of Court from what was envisaged by s.152\(^2\), and this fact was, according to the Chief Justice, sufficient to justify the view that the Act was passed in contravention of s.152.

\(^1\) Ibid., at p. 780.
\(^2\) The differences were due to (i) common membership in Parliament and the High Court of Parliament, (ii) the denial of access to the High Court of Parliament of individuals, (iii) and the effect of a decision of the High Court of Parliament being the same as legislation repealing the safeguards contained in s.152: ibid., at p. 782.
Another (or better) approach, however, to the problem whether the High Court of Parliament was in fact a Court of Law was, the Chief Justice suggested, to have a look at the substance and not merely the form of the Act. In form the High Court of Parliament was a "court of law"; in form there was a "judicial committee"; and in form the High Court of Parliament might on "legal grounds" "confirm, vary or set aside" the judgment of the Appellate Division. But when one looked at the substance of the matter, the so-called "High Court of Parliament" was not a Court of Law but was simply Parliament functioning under another name. The High Court of Parliament differed in material respects from a Court of Law because (i) members of Parliament were also members of the High Court of Parliament and they first in their capacity as legislators passed an Act and then in their capacity as judges were called upon to adjudicate upon it, (ii) individuals who had been deprived of their rights, did not have access to the High Court of Parliament; it was only a Minister of State who was competent to approach that Court, although he might not be a party to a dispute, and although parties to a dispute themselves might not wish to carry the matter any further, (iii) the High Court of Parliament being the highest Court in the land
deprived an individual of his right to challenge an Act on the ground that the Act was not passed in conformity with the procedure prescribed by s. 152. The procedure prescribed by the Act was Parliamentary and unknown to Courts of Law because Courts of Law were not supposed to delegate to a body such as a "judicial committee" the task of ascertaining what the law was and then "by resolution" give its judgment. And the fact that the High Court of Parliament might on any "legal ground" confirm, vary or set aside any judgment of the Appellate Division did not carry the matter any further because it was still Parliament that was functioning and not a Court of Law. "The result is exactly the same", continued the Chief Justice, "as if Parliament had sat unicamerally in passing Act 46 of 1951, had passed that Act by a majority falling short of the prescribed two-thirds majority and had, after hearing counsel in select committee, inserted therein a section declaring that on legal grounds the Act was valid". Thus Parliament could not by passing an Act giving itself the name of a Court of Law come to any decision which would have the effect of destroying the entrenched provisions of s. 152.

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1952(4)] S.A. 769, at p. 784.
Other members of the Court also, like the Chief Justice, assumed, though each offering slightly different grounds, that under the Constitution Courts of Law had a power of judicial review in relation to a law which dealt with certain rights conferred on individuals by the entrenched clauses, and at the same time passed otherwise than in accordance with the procedure prescribed by those clauses. They also agreed with the Chief Justice that the High Court of Parliament did not, in substance, conform to the requirements of a Court of Law, and, therefore, the High Court of Parliament Act setting up that Court was passed in contravention of s.152 and was invalid.

But suppose Parliament sitting bicamerally passed an Act providing for the establishment of a tribunal which conformed to the requirements of a Court of Law with jurisdiction to review the decisions of the Appellate Division generally. Would such an Act be held valid?

Centlivres C.J. would possibly agree to uphold the validity of such an Act. Greenberg J.A. was clearly of the
opinion that it could validly be done "whether it be a
general jurisdiction or a jurisdiction limited to certain
questions"\(^1\). On the other hand, Schreiner J.A. thought
it unnecessary and to some extent unsatisfactory to
proceed on those lines because "it would involve a radical
departure from the judicial hierarchy set up in the
Constitution and a grave impairment of the protective
system implicit in s.152"\(^2\). He would thus regard the
establishment of such a tribunal as having the effect of
altering or amending the rights entrenched by s.152.

Van Den Heever J.A. adopted a somewhat different
approach which was based primarily on the supremacy of the
Constitution. "The fact remains" he said, "that the
South Africa Act is our constitution and apart from that
constitution there are no organs of state and no powers"\(^3\).
The powers of Parliament had their source in the South
Africa Act, there being no other conceivable source of
such power, and therefore in the exercise of those powers
Parliament must continue to observe the provisions of that
Act. Under the Constitution Parliament functioning

\(^1\)Ibid., at p. 785.
\(^2\)Ibid., at p. 788.
\(^3\)Ibid., at p. 791.
bicamerally had unlimited power to reorganise the judiciary. It could thus create a Court, or Courts, superior to the Appellate Division and confer upon them such jurisdiction as it thought fit. However there was only one limitation that the Court so created must be a Court of Law. As a Court of Law was conceived as being the arbiter between Parliament and subjects, it was said that "it must necessarily be a body other than Parliament and capable of passing judgment on that issue".¹

However, the importance of the case lies in the recognition of the fact that though the High Court of Parliament Act provided in form only for an amendment of the judicial system, it was in substance an attempt by Parliament sitting bicamerally to alter or amend s.152. This aspect was discussed in detail by Centlivres C.J.², with whom Greenberg J.A. was in no disagreement. Hoexter J.A. also emphasised it in support of his arguments against the validity of the Act. He said:

To accept the proposition that the High Court is a Court of Law because the Act says so would be to assume the validity of the Act and therefore

¹Ibid., at p. 792.
²See supra, at pp. 182-3.
³[1952(4)] S.A. 769, at p. 787.
to beg the very question in issue. It is because this Court may not assume the validity of the Act that it is its duty to penetrate the form of the Act in order to ascertain its substance.

Schreiner J.A. used rather different expression but meant to apply the same principle. In reaching his conclusion that the High Court of Parliament was not a Court of Law he said that by "wearing some of the trappings of a Court" Parliament had "simply itself assumed the role of watchman over its own actions". Van Den Heever J.A. also thought the same way. "No legislative organ", he said, "can perform an act of levitation and lift itself above its own powers by the bootstrap of method". It was pointed out that if a legislature did not succeed in barring avenues to the realisation of some mischief which was sought to be repressed, it would be perfectly legitimate for the subject to practise evasion and a Court would give the statute a restrictive interpretation. It would be a different matter, however, if the statute expressly applied curbs on legislative powers in the interests of the subject. In the latter case "a Court would not be doing its duty", he said, "if by

1 Ibid., at p. 796.
2 Ibid., at p. 788.
3 Ibid., at p. 790.
mechanical adherence to words it allowed the patent intention of the constituent Legislature to be defeated and the rights to be proscribed"\(^1\).

Van Den Heever J.A. also said that "it (Parliament) cannot empower another to do what it cannot do by itself"\(^2\). This statement by itself stands to reason, but according to his previous reasoning, no question of "empowering" another body arose here; it was the proper function of the judiciary to decide the issue, and his Honour had conceded that Parliament could reorganise the judiciary. Hence the only question was whether the "High Court of Parliament" constituted a "reorganised judiciary" or something else. If the Court in question had conformed to the requirements of a Court of Law, there would have been no further question of empowering it because, according to him, it would then have the capacity to adjudicate upon any question (of course, depending upon its place in the hierarchy of Courts of Law) as being the arbiter between Parliament and subjects.

However this statement of Van Den Heever J.A.

\(^1\) Ibid., at p. 794.
\(^2\) Ibid., at p. 790.
appears to become relevant in the context of the view taken by Greenberg J.A., and possibly Centlivres C.J., as to the conferring of general jurisdiction on a bicameral-  
created tribunal which conformed to the requirements of a Court of Law. According to them, such a conferment could validly be carried out under the Constitution. But would this not have the effect of rendering nugatory the safeguards enshrined in s.152? If Parliament could not alter or amend the entrenched clauses except in a manner prescribed by s.152, it could not accordingly empower another body to alter or amend those clauses unless it adopted the procedure prescribed by s.152, even although that body might conform to the requirements of a Court of Law. Here the remarks of Schreiner J.A. might be recalled. "Other tribunals can readily be conceived", he said, "which would ordinarily be called Courts of Law but to which it is difficult to believe that Parliament could effectively entrust by bicameral legislation the power to declare the validity or invalidity of Acts of Parliament"¹. These remarks appear to be more realistic and in line with the spirit of the Constitution than the views of Centlivres C.J. and Greenberg J.A.

¹ Ibid., at p. 788.
After an unfavourable decision in the High Court Case, the Government thought of vindicating the sovereignty of Parliament by an Act passed unicamerally with a two-thirds majority so that the Act might not any more be open to attack in the Courts. In September 1953 and again in May 1954 attempts were made to validate the Separate Representation of Voters Act of 1951, in a joint session of both Houses of Parliament, but each time the Bill lapsed because it failed to secure the necessary two-thirds majority. Then in May 1955 the Government introduced a Bill to provide for a dissolution and reconstitution of the Senate, such that the Government would at any joint sitting of both the Houses have a two-thirds majority. The Bill was passed bicamerally and became an Act known as the Senate Act, 1955\(^1\). The political aims of the Act were no secret; they were to put the Coloureds on a separate roll and to put the sovereignty of Parliament beyond all doubt in terms of the decision in Ndlwana's Case, but the preamble to the Act did not state any reason for the expediency\(^2\). The Senate was accordingly

\(^1\) Act No. 53 of 1955 (South Africa).

\(^2\) The preamble to the Act simply stated thus: "To make provision for the dissolution and the constitution of the Senate, to amend the South Africa Act, 1909, and the South-West Africa Affairs Amendment Act, 1949, and to provide for matters incidental thereto."
reconstituted under the Act, and the Government could command a two-thirds majority in a joint session of both the Houses. In March 1956 the South Africa Amendment Act\(^1\), hereinafter called the Validation Act, which purported to validate the Separate Representation Act and to abolish the jurisdiction of the Courts to pronounce upon the validity of Acts of Parliament\(^2\), was passed by a two-thirds majority in a joint session of both the Houses in conformity with the provisions of s.152 of the South Africa Act.

A coloured person living in the Cape Province applied to the Cape Provincial Division of the Supreme Court for an order declaring that the Senate Act as well as the Validation Act were invalid, null and void and of no legal force in terms of s.35 and s.152 of the South Africa Act. It was alleged that the Senate Act, in itself or in conjunction with the Validation Act, had the effect of destroying the constitutional guarantees contained in s.35 and s.152, and was enacted as part of a legislative plan or scheme designed to effect indirectly the removal of coloured voters from the common roll in the Cape Province and to disqualify coloured persons in future from

\(^1\) Act No. 9 of 1956 (South Africa).

\(^2\) With the expressed exception of Bills affecting the status of the English and Dutch languages (s.137 and s.152 of the South Africa Act).
registration on such roll, in violation of the rights safeguarded to them in terms of s.35 and s.152. Such a plan or scheme was denied by the Government and it was stated that the Senate Act was passed in the *bona fide* view that it could be passed by Parliament sitting bicamerally¹, that the reconstitution of the Senate might assist in the final ending of the constitutional situation and that the Validation Act was passed in the *bona fide* view that it could be passed at a joint sitting of the two Houses of Parliament in conformity with the provisions of s.35 and s.152 of the South Africa Act. The Cape Provincial Division upheld the validity of the impugned Acts and dismissed the application. An appeal was then taken to the Appellate Division, which, with the dissent of Schreiner J.A., confirmed the decision of the Provincial Division in *Collins v. Minister of the Interior*².

The majority judgment was delivered by Centlivres C.J., with Steyn J.A., delivering a separate concurring judgment. According to the majority, the Senate Act and the Validation Act, when taken by themselves, could not be

¹ See s.25 of the South Africa Act, which provides: "Parliament may provide for the manner in which the Senate shall be constituted after the expiration of ten years, ...".

² (1957(1)) S.A. 552, (A.D.) (the Senate Case).
said to be invalid as an infringement of the entrenched clauses, as the former did not repeal or alter any provision contained in those sections and the latter was passed by more than a two-thirds majority at the joint session of both the Houses of Parliament. It was clear that the object of passing the Senate Act was to increase the membership of the Senate so that the Government would succeed in obtaining the necessary two-thirds majority at a joint session of both the Houses in order to validate the Separate Representation Act, but if Parliament sitting bicamerally had plenary power to reconstitute the Senate, that object being the motive or ulterior purpose would be irrelevant in law. "If a legislature", said the Chief Justice, "has plenary power to legislate on a particular matter no question can arise as to the validity of any legislation on that matter and such legislation is valid whatever the real purpose of that legislation is".

It was contended that the reconstituted Senate was not one of the "Houses of Parliament" within the meaning of s.152. In other words, s.152 should be construed in such manner as to invalidate any Act which destroyed any

1 Ibid., at p. 565 (Italics supplied).
entrenched rights when such an Act was passed by means of a two-thirds majority which was artificially created for the very purpose of passing that Act. According to the Chief Justice, there was no authority for justifying such a construction. The Senate Act, which created the artificial majority, was not hit by s.152 unless one read something by implication into that section (there being no express statement to that effect). Parliament sitting bicamerally might conceivably circumvent the provisions of s.152 by reconstituting either House or both Houses for the purpose of providing the Government with the necessary majority, nevertheless the only remedy for such an abuse of power was an appeal to the electorate.

The High Court Case was distinguished from the present one on the ground that the so-called High Court of Parliament was not a Court of Law so as to provide the sanction of invalidity but in substance simply Parliament functioning under another name, whereas in the present case it could not be said that the reconstituted Senate was not a Senate in the ordinary meaning of that word. As the Senate Act was not hit by the provisions of s.152, it followed that Parliament sitting bicamerally had plenary powers to reconstitute the Senate in any manner it pleased and that the purpose or motive which it had in
mind was irrelevant in law.

It was further contended that following the High Court Case, the direct effect of the Senate Act was to render nugatory the appellant's rights entrenched by s.35 and s.152; it was the passing of that Act (bicamerally) that resulted in the passing of the Validation Act rendering the appellant's rights valueless; and the framers of the Constitution never intended that the entrenched rights could be deprived by means of a legislative plan or scheme otherwise than by means of a genuine two-thirds majority at a joint sitting of the two Houses. The Chief Justice approached this contention by considering each step taken in the scheme and came to the conclusion that each of the Acts, was, on its face, intra vires and each was enacted by a legislature which was competent to enact it. Thus each step in the legislative scheme to pass the Validation Act was taken in accordance with the provisions of the South Africa Act and the scheme as a whole was designed in such a way that the Separate Representation Act would be validated in accordance with the requirements of s.35 and s.152.

The dissent of Schreiner J.A., was in sharp contrast to the majority judgment. He was of the view that a
Senate constituted ad hoc for the purpose of securing, by nomination, or its equivalent, a two-thirds majority in a contemplated joint sitting was not a House of Parliament within the meaning of s.152. There did not seem to be any doubt that Parliament could, acting bicamerally, assign to any body of persons whatsoever the title of Senate and give it the ordinary functions exercisable bicamerally. But any legislative action which affected the entrenched rights must conform to the requirements of s.152, as a matter of substance and not merely as a matter of form. It was thus necessary to examine the circumstances surrounding the passing of the Senate Act, to see whether the reconstituted Senate was really a House of Parliament for the purposes of s.152. The proviso to that section was intended to furnish a real and not a merely theoretical protection against Parliamentary majorities acting bicamerally. The framers of the Constitution did not intend that Parliament should have the power by bicameral legislation to convert an insufficient majority in a joint session into a sufficient one, merely by invoking the procedure of nomination or its equivalent.

The argument for the Government was based upon the reasoning that so long as the legislation affecting the
franchise of the coloured people could be split up into stages, each of which taken by itself was legal (as happened to be the case), the whole was legal, even though the two or more Acts required constituted a legislative plan to create a two-thirds majority by introducing into the legislature persons nominated for the sole purpose of securing that majority. There appeared to be, said Schreiner J.A., no authority for such a proposition and it seemed to be contrary to principle. In general the parts of a scheme took their character from the whole. A scheme to defraud was an obvious example. Another was a scheme to get round a legislative obstacle.

Then, according to Schreiner J.A., where there was a legislative plan to do indirectly what the legislature had no power to do directly, the plan and its purpose might become crucial to validity. Thus the validity of what Parliament did in passing the Senate Act, in his view, closely related to the purpose with which it was done and only by having regard to that purpose one could judge whether the Senate set up by that Act was a House of Parliament within the meaning of s.152.

It was pointed out that motive and purpose were not always used in the same sense although one was sometimes
used as equivalent to the other, and it made no differ-
ence whether the legislature had attempted to disguise
its purposes or whether it had made no such attempt.
However, in the absence of any clear purpose expressed in
the Senate Act and if in fact the only real expediency
related to the creation of a two-thirds majority in the
contemplated joint sitting, the Act was in truth legisla-
tion for the amendment of Cape franchise which was
disguised as legislation for the improvement of the
Senate. An identical Senate Act passed in other circum-
stances not connected with a plan to provide a two-thirds
majority in the contemplated joint sitting would have been
a valid Act. "The difference in the two results of the
identical Act follows," explained Schreiner J.A., "not
from a difference between the motives of the legislators,
but from a difference in the purpose of the two Acts, the
one being part of a legislative plan, the other not"\(^1\).
Also a legislative plan to secure a two-thirds majority by
modifying the system of delimitation of electoral areas
so as to favour the Government, or by changing the quali-
fications of voters, as for instance, by reducing the age
limit, might not be invalid as being too remote a

\(^{1}\) Ibid., at p. 580.
consequence to warrant the conclusion that that was the purpose of the Act. It might only be equivalent to a motive.

Schreiner J.A., referred to the High Court Case, and said that the crucial defect in the High Court of Parliament was, not that it could in no circumstances be regarded as a court, but that it was not a court for the purposes of s.152, and the position of the Senate under the Senate Act seemed to be similar. It is true that the High Court of Parliament was not given jurisdiction in matters other than those in which the validity of an Act of Parliament was in question, but had it been given such jurisdiction it would have made no difference. Similarly the fact that the plan followed by Parliament was to pass an Act which did not differentiate between the two functions of the Senate (for the purposes of s.152 and otherwise), could not make any difference in the substance of the matter.

Both the majority and the minority referred to the American, Canadian or Australian authorities in support of their arguments. How far these authorities could be a safe guide to deal with problems arising in a unitary state like South Africa could not be said with certainty.
In a federal constitution legislative power is divided between central government and regional governments and courts have a power to review their actions in case of an encroachment by one over the jurisdiction of the other, whereas in a unitary constitution there is no such division of power and courts have no such role to play. To this extent there is no similarity between the constitutions of the United States, Canada and Australia, and the constitution of South Africa. However, a written constitution, federal or unitary, may provide for civil liberties and prescribe checks against their alteration or repeal. In this respect the Bill of Rights in the United States Constitution may seem to bear an analogy to the `entrenched clauses' in the South Africa Act. But this analogy is rather superficial than real as under the United States constitution the process of amendment is the same for the Bill of Rights as for the rest of the constitution, whereas it is only the `entrenched rights' which enjoy a special status in the South African Act. Thus a problem such as the one involved in the present case would not arise in the United States, and the cases decided by the Supreme Court might not be a safe guide for courts in South Africa. However, the authorities from the federations appear to have been used under the
impression that the 'entrenched clauses' bear a fair analogy to provisions delimiting competing spheres in a federation.

Under the South Africa Act there is only one Parliament empowered to exercise legislative functions in the Union and no question of competence would arise as such in the courts. However, it may have to follow different procedures, bicamerally or unicamerally, for different purposes as provided in the Act, and non-compliance with a procedure may provide an occasion for its actions to be challenged in a court. A problem of characterisation might arise but only in an indirect way, if at all, for the purpose of ascertaining whether proper procedure has been followed in the passing of a law in question. Even when the characterisation of a law is in issue, since the supremacy of Parliament is the rule and non-compliance with the procedure only exceptionally an invalidating factor, it is the necessary legal effect of the law that should be the determining factor for validity. Thus one would expect that purpose may not be so important in South Africa as in a federation. Moreover, civil liberties guaranteed in a constitution confer no positive functions, but act as prohibitions upon the powers of a
legislature, and it is all the more pertinent to look to the law rather than its consequences. It is true that policy considerations play an important role in the United States Supreme Court, but that is mainly due to the concept of "due process of law" which does not appear in the South Africa Act. Further, the entrenched clauses¹, in contrast with the Bill of Rights which act as prohibitions of substance, provide a check only of procedure, and this fact also minimises the importance of setting or context and consequences of a law.

However, though there was no disagreement that the motive which actuated the legislation was irrelevant, the basic difference between the two approaches centred round the relevancy of purpose. The majority thought that the purpose for which an Act or a scheme consisting of two or more Acts was passed was irrelevant in law because the operation of the proviso of s. 152 was confined to an Act which would have the legal effect of rendering nugatory the entrenched rights. On the other hand, the minority was of the view that the subject-matter and the setting or context were often of crucial importance, and a plan consisting of two or more Acts must be examined as a whole by reference to its ultimate effect in spite of the fact that each Act taken by itself belonged to a different
field. It is true that the distinction between purpose and motive is sometimes difficult to work out, but they are not the same. However, a possibility of abuse, even if it be almost certain under the circumstances, would rank only as motive. Bearing this in mind, an Act has first to be characterised as affecting entrenched or unentrenched rights. Then the validity of the Act depends entirely on the procedure adopted by Parliament, as entrenched rights could be destroyed only at a joint sitting of the two Houses of Parliament, in terms of the proviso to s.152. In the Senate Act there was nothing which gave any indication that its provisions were likely to be used in order to avoid the proviso to s.152. The purpose was to reconstitute the Senate and the Act could not be characterised as affecting the entrenched rights. The Validation Act did affect the entrenched rights but it was passed in conformity with the proviso to s.152. Thus the scheme or plan was not to affect indirectly something which Parliament did not have the power to achieve directly. Schreiner J.A., of course, realised "Where is one to stop"? but he went too far in the direction of reading the "purpose" into the legislation.

Both the majority and minority heavily relied on the
High Court Case. The crucial question in that case was whether the High Court of Parliament Act rendered the entrenched rights nugatory in law. If that was so, the Act must have been passed in conformity to the proviso to s.152. There it was assumed by all the members of the Court, rightly or wrongly, that a power of judicial review existed under the South Africa Act to enforce the entrenched rights. Thus if a new Court was to be provided so as to review the decisions of the Appellate Division, it must be in substance, not in form, a Court of Law. But it was found that the High Court of Parliament as provided in the Act was not in substance a Court of Law. In other words, it had the effect of rendering the entrenched rights nugatory in law. However, similar considerations do not apply to the Senate reconstituted under the Senate Act. No assumption could be read in the proviso to s.152 against the reconstitution of the Senate. On the other hand, it is expressly provided in the South Africa Act that it could validly be done by Parliament sitting bicamerally. In another respect too the present case differed in that the question related to the validity of two Acts constituting a plan or scheme whereas the High Court Case involved only one Act. In the case of a plan or scheme the Acts must be so inter-connected as to be apparent, or raise a very strong presumption, to achieve
a certain purpose or object. No such inter-connection was noticeable in the plan or scheme involved in the present case.

However, from the point of view of the maxim we are considering, the contrast between the High Court of Parliament Case and the Senate Case brings out with unusual clarity two general points of importance.

Firstly, there is the question of 'directness' and 'indirectness'. We can assume in the two cases, as a result of the decision in the Vote Case, that "abolition of the coloured vote otherwise than by a joint meeting" was the prohibited purpose which might not be achieved directly and therefore not indirectly. But there was obviously a considerable contrast in the machinery of the two cases on this from the point of what was being achieved. If the High Court of Parliament Act had been held valid, then undoubtedly the coloured vote would have been abolished without a joint meeting of parliament. That is, the very thing which was prohibited would have been achieved. But under the Senate Act, a state of affairs was created in which the 'prohibited thing' was not achieved at all. The abolition of the coloured vote pursuant to the Senate Act was carried out at a joint
meeting. The dissenting opinion of Schreiner A.J. involves as its basis not merely the proposition: "coloured vote shall not be abolished save at a joint meeting"; it involves the much wider proposition: "coloured vote shall not be abolished even at a joint meeting if other powers have been used so as to ensure that there will be a suitable vote at that meeting". Indeed, his Honour's view went close to saying: "coloured vote shall not be abolished at all", which is plainly not the constitutional prohibition. It was a somewhat bold and courageous step for the appellate court to take when it constructed the first prohibition mentioned as if it were a fundamental guarantee of the same politico-legal type as the guarantees in the first fourteen amendments to the Constitution of the U.S.A. To expand this prohibition into the second form advocated by Schreiner A.J. would in effect have landed the Court in the embarrassing responsibility of investigating and weighing up all the motives and purposes which might influence any government and parliamentary majority when proposing any alteration in the franchise, electoral districts, absent voting laws etc. in relation to the Senate. Indeed, the restriction would not have been confined to the Senate, since the required majority could equally well result from an alteration in the size
and political balance of the Lower House. Perhaps, indeed, Schreiner A.J.'s view would have involved the consequence that the laws relating to the structure of parliament would have to remain frozen so long as the abolition of the coloured vote was a political issue at all.

This leads us to the second important point arising from these cases. They can be seen as involving the Court in a choice of two legal values, or perhaps one should say "constitutional" values. This is seen most clearly in the Senate Case. On the one hand was the value of preserving so far as possible the rights protected by the entrenched clauses. On the other hand was the constitutional value of the legislature's power to pass bicamerally any legislation dealing with the structure of the Houses of Parliament; the competence of Parliament to deal with those questions has always been regarded by the communities of the British Commonwealth as an important value, a competence which ought to be possessed by legislatures and through them by the people at large. The view adopted by Schreiner A.J. would necessarily have placed a considerable restraint on the legislative competence to deal with the structure of
Parliament. Moreover, although the Senate Act was undoubtedly framed for a motive derived from the position of coloured voters, and for the purpose of abolishing that vote, it was not in itself legislation of an unusual type. The Senate was a political body, making political decisions for political reasons, and this essential character was in no way altered by the Senate Act. Hence to strike this legislation down for the purpose of preserving the coloured vote would have involved a very serious clash between the two "constitutional values" concerned.

But there was also a clash of this character in the High Court Case. It is not so clearly seen because of the empirical circumstance that the High Court of Parliament Act was not on its face an ordinary exercise of the relevant kind of legislative power - here, power with respect to the structure of the judiciary. But there was a clash of values in this case. The values embodied in the entrenched clauses had to be weighed against the constitutional value of a competence to re-organise the judiciary. Here it was possible and persuasive to prefer the values of the entrenched clauses, precisely because the operation of transforming
parliament into a court was in the setting of contemporary government so bizarre, so unlikely to occur at all frequently, if ever again. The contrast between the two cases is therefore brought out by putting to a practical democratic statesman, familiar with the fundamental ways of thought of modern constitutional states, the following questions. "If the High Court of Parliament Act is held invalid, you may be denied the power of vesting in the legislature for the time being a power to determine particular legal disputes as if the legislature were a court. Is this a serious restriction on your future competence? If the Senate Act is held invalid, you may be denied the power in relation to either House of Parliament to amend the law relating to the qualifications for voters and candidates, the distribution of voters in electorates, the kind of electoral counting system used and any other details of the electoral arrangements if it is shown that this is being done in order to increase the chances of a particular majority being achieved at a joint meeting of the two Houses. Is this a serious restriction of your future competence?"

After the decision in the Senate Case, courts were left with no jurisdiction to review Acts of Parliament.
However, the experiment in South Africa displayed that even in a unitary constitution, courts could, on the assumption of a power of judicial review, declare an Act of Parliament invalid as infringing the provisions of a constitution. In South Africa the conflict arose due to the differing opinions as to the concept of "sovereignty of Parliament". Dicey's classification of a "sovereign" and "non-sovereign" body is not universally accepted today, and a legislature having constitutional limitations may be sovereign within the scope of its defined powers. Even Dicey's political doctrine of "sovereignty" - Parliament can do or undo anything whatever and is subject to no limitations - has been considerably modified after the passing of the Statute of Westminster, 1931. Can s.4 of the Statute be repealed? However the problem that arose under the South Africa Act was somewhat of a different nature as the limitation imposed upon the Union Parliament was procedural, not substantive. But it made no difference as legal sovereignty could still be divided between Parliament as ordinarily constituted, and Parliament as constituted under the proviso to s.152. At the same time courts were equally conscious that Parliament might not "perform an act of levitation and lift itself above
its own powers by the bootstraps of method", otherwise the "entrenched clauses" would be protective in name only.
PART TWO

Operation of our Maxim

in

Administrative Law
CHAPTER VI

Doctrine of Ultra Vires

The doctrine of ultra vires enables the English courts to review the actions of administrative bodies empowered to exercise discretion within limitations prescribed by the enabling statutes. It thus keeps the actions of such bodies within the bounds of law, if the power is exceeded, or exercised not in accordance with the procedure laid down in the statute, or violated the principles of natural justice. It also comes into operation if the power is exercised for an unauthorised or improper purpose, or on the basis of irrelevant considerations, or in disregard of relevant considerations, or with gross unreasonableness, even though the action is within its limits and in compliance with all legal requirements. Thus an abuse of statutory power or its exercise for a purpose other than those for which it was given invites the application of our maxim.

In preventing the abuse of statutory powers the underlying basis of the doctrine of ultra vires is that
the courts would be prepared to look into the purpose by reference to which the public authorities exercise their powers and would not allow them to be used for a purpose other than that for which they were conferred. In France, too, judicial review of the exercise of statutory powers by the Conseil d'Etat developed on the same basis under the name of detournement de pouvoir, but it has a much wider scope in its application than the doctrine of ultra vires in England. Detournement de pouvoir operates "by reading into a statute, framed in general terms and apparently giving an unlimited discretion, a special and limited purpose (but) and quashing as a detournement de pouvoir the use of the power or discretion not clearly directed to the attainment of that purpose so read into the statute by the Conseil d'Etat". But one of the grounds for annulment, cas d'ouverture as they are called, is violation de la loi which enables the Conseil d'Etat to devise rules similar to "the rules of natural justice" not only to govern tribunals "but also to govern the transaction of administrative business by the executive".


3 Ibid., at p. 172.
and thus to impose "upon the administration conformity to a standard of conduct not enacted as obligatory by any recognised legislative authority"\(^1\). The *Conseil d'Etat* in formulating these standards "may look to any source which it considers relevant"\(^2\). It may require the authority to state the grounds of its decision, even when it is not obligatory, and investigate into them to arrive at its independent opinion\(^3\). Thus if a person under a law prohibiting the buying of land without prior authorisation of the prefect or minister is refused permission to buy some land on grounds of 'public interest', the *Conseil d'Etat* would hold it too wide and insufficient a ground for refusal and might ask the authority to state more specific reasons to justify its action\(^4\).

The English courts in applying the doctrine of *ultra vires* probe only up to a certain point in ascertaining whether there has been an abuse of a statutory power and certainly would not go as far as the *Conseil d'Etat* even

though "theoretically the doctrine of *ultra vires* includes the *cas d'ouvertures*"\(^1\). In *R. v. Brighton; ex parte Shoosmith*\(^2\), the court refused to intervene when a local authority having power to improve a road for public benefit put a tarmac surface on the road so as to have it ready for races in time. Similarly in *Re Decision of Walker*\(^3\), the court was concerned with the amount paid in wages and not the motive which led to that amount being paid. "How and why they arrive at that particular figure is", in the opinion of Lord Goddard C.J., "irrelevant. If the result is a reasonable sum, that is enough to justify the payment"\(^4\). Further, if the authorities do not state their reasons for reaching a certain decision, the courts cannot compel them to do so\(^5\).

However, in few cases the English courts appear to have developed the doctrine of *ultra vires* parallel to the

\(^1\) *Ibid.*, at p. 166.


\(^3\) [1944] 1 K.B. 644.


French doctrine of *detournement de pouvoir*. In *Roberts v. Hopwood*¹, it was held that the discretion conferred upon a local authority to fix wages *as it thinks fit* must be exercised reasonably; the fixing by the authority of an arbitrary sum for wages without regard to existing labour conditions was not an exercise of that discretion; and an excess of expenditure on that ground was liable to be disallowed by the auditor as contrary to law. "I do not find any words", said Lord Sumner, "limiting his functions merely to the case of bad faith, or obliging him to leave the ratepayers unprotected from the effects on their pockets of honest stupidity or unpractical idealism"². In *R. v. Brighton Corporation; ex parte T. Tilling Ltd.*³, a local authority empowered to grant licenses to enable motor buses to ply for hire was required to "treat all applicants alike", the Court insisting on administrative equality. In *Nakkuda Ali v. Jayaratne*⁴, the rules of natural justice were applied by the Privy Council; it was held that the words "where the

¹ [1925] A.C. 578.
³ (1916) 85 L.J.K.B. 1552.
Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer were to be treated as imposing a condition that there must in fact exist such reasonable grounds, known to the Controller, before he could validly exercise the power of cancellation. In such cases the courts resorted to seeking guidance in extra-positive concepts. But the impact of these concepts on the nature of judicial process depends upon the exigencies and public opinion which vary from time to time, and there has been a continual movement back and forth between wide and narrow interpretation of administrative powers, the former ousting or restricting judicial review whereas the latter permitting it by reference to extra-positive concepts. This sort of inquiry is far from the full acceptance or introduction of the French doctrine into the English law.

But the underlying application of our maxim can be seen in the operation of the administrative law concepts of 'unauthorised or improper purpose', 'extraneous or irrelevant consideration' and 'unreasonableness'. These grounds "overlap to a very great extent" and "run into one another", but still it would be convenient to deal

with them separately.

II

Unauthorised or Improper Purpose

Statutory powers are often conferred in terms which require them to be exercised for a particular purpose, and the exercise of these powers for any other purpose would be null and void as ultra vires. In Galloway v. Mayor and Commonalty of London, Lord Cranworth L.C., discussing the validity of the exercise of a discretionary power concerned with the compulsory purchase of land, said: "Any company authorised by the Legislature to take compulsorily the land of another for a definite object, will, if attempting to take it for any other object, be restrained by the injunction of the Court of Chancery from so doing." Similarly in Municipal Council of Sydney v. Campbell, the acquisition of the land by the Municipal Council of Sydney which was empowered to acquire land compulsorily for the purpose of extending streets or improving the city, was held as an invalid exercise of

1 (1866) L.R. 1 H.L. 34.
2 Ibid., at p. 43.
3 [1925] A.C. 338; also refer to R. v. Minister of Health; ex parte Davis [1929] 1 K.B. 619.
power on the ground that the Council, purporting to exercise its power, acquired land, not for the purpose of extension or improvement, but with the object of taking advantage of an anticipated increment in value. "A body such as the Municipal Council of Sydney authorised to take land compulsorily for specified purposes", said Duff J., "will not be permitted to exercise its powers for different purposes, and if it attempts to do so, the Courts will interfere". Another way of acquiring land for an unauthorised or improper purpose is illustrated in Werribee Council v. Kerr. The respondent was the owner of certain land through which there had formerly been a government road but purchased later by the respondent's predecessor. A company obtained the permission of the appellant, a municipal council, to run a line of pipes along the road and did so run the pipes without the consent of the respondent. The respondent obtained an injunction directing the company to remove the pipes. Subsequently, at the suggestion of the company the appellant proposed compulsorily to acquire the land along which the pipes were placed for the purpose of providing a public road. The respondent opposed such

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1 Ibid., at p. 343.
2 (1928) 42 C.L.R. 1.
action on the ground that the real purpose of the appellant in acquiring the land was not to provide a road but to enable the company to continue the pipes in the situation in which they had been placed. The High Court accepted the respondent's contention and held in his favour.

On the same principle in Hanson v. Radcliffe U.D.C.\(^1\),

dismissal of teachers on the ground of economy by a local authority which had the power to dismiss them on educational grounds was disapproved because "the mere desire to economise does not ... entitle the local education authority to terminate the employment of a teacher, alleging that to be an educational ground".

If a power is conferred on an authority in such terms that it appears that the power was conferred for a particular purpose, it must be exercised only for that purpose. In order to prove abuse of power, the power must have been exercised for some other purpose and it is not enough to show that the authority contemplated that the power might be used for an unauthorised purpose. In

\(^1\) [1922] 2 Ch. 490. See also Sadler v. Sheffield Corporation; Dyson v. Sheffield Corporation [1924] 1 Ch. 483; Smith v. McNally [1912] 1 Ch. 816; Blanchard v. Dunlop [1917] 1 Ch. 165; Martin v. Eccles Corporation [1919] 1 Ch. 387.
Westminster Corporation v. London and North Western Ry.\(^1\), the Westminster Corporation having power to construct public conveniences, constructed underground conveniences in such a way that the subway leading to them also provided a means of crossing a busy street. The construction was challenged on the ground that the real object of providing the subway was not public conveniences but the provision of a crossing. The Court of Appeal thought "bad faith" was shown; the House of Lords (by majority) reversed that decision. "In order to make out a case of bad faith", said Lord McNaughton, "it must be shewn that the corporation constructed this subway as a means of crossing the street under colour and pretence of public conveniences which were not really wanted" at that particular place."\(^2\)

When a power is conferred by reference to a purpose which is rather vague, the court tries to define its scope by looking into the context and setting of the Act. In Middlesex County Council v. Miller\(^3\), it was held to be an abuse of power where a Nurses\(^1\) Act gave a licensing authority power to grant a license to a person desiring to

\(^1\) [1905] A.C. 426.

\(^2\) Ibid., at p. 432. (Italics supplied).

carry on an agency for nurses "subject to such conditions as they may think fit for securing the proper conduct of Agency, including conditions as to the fees charged by the person carrying on the agency, whether to the nurses or other persons supplied, or to the persons to whom they are supplied", and the authority had imposed as a condition: "The licensee shall not demand or receive from any person any sum in respect of the services of any nurse or other person supplied which is in excess of the amount appropriate to that nurse or other person calculated in accordance with the scale of charges approved by the council and furnished to the licensee". Lord Goddard C.J., referred to the implied purpose of providing such a legislation dealing with domestic servant agencies, or employment agencies, or agencies of similar descriptions, by pointing out that some agents "charge excessive fees and may very likely prevent people getting employment except on the terms of their having to pay excessive remuneration, or impose upon them improper or undesirable terms" \(^1\), and therefore, described any condition coupled with the fees to be paid to the nurse as not for the purpose of securing the proper conduct of Agency.

\(^1\) Ibid., at pp. 442, 443.
Statutory power is sometimes conferred upon an authority with no reference to purpose. Does it mean that the authority has an absolute discretion in exercising its power and the courts would not bother to inquire in terms of result or consequence desired or intended to be achieved, or concerned with bad faith? In Arthur Yates & Co. Pty Ltd v. Vegetable Seeds Committee\(^1\), Latham C.J. remarked that in such cases no inquiry into purpose would be relevant. It appears to be an *overstatement*\(^2\) as the courts do not assume the conferment of an unfettered discretion in terms of absoluteness and would "interfere in cases where there is not a bona fide exercise of the powers given by the Parliament"\(^3\). Public bodies under general powers cannot do whatever they think right and the tendency has been to narrow down the scope of the exercise of discretion by referring to the *spirit of the enacted law* or its nature gathered from its context. In R.v. Paddington & St Marylebone Rent Tribunal\(^4\), the Court

\(^1\) (1945) 72 C.L.R. 37 (the Vegetable Seeds Case), at p.68.
\(^2\) See de Smith, Judicial Review of Administrative Action (1959) at p. 192.
\(^3\) Biddulph v. The Vestry of St George, Hanover Square (1863) 33 L.J. (Ch.) 411, at p. 417.
defined the limits of discretionary powers of the authority in order to restrain it from exceeding or abusing its powers, even though there was no express mention of any purpose in the Act. In that case, having power to refer tenancy contracts to a rent tribunal for rent review under the Furnished Houses (Rent Control) Act, 1946, a local authority, in pursuance to their policy that where two or more rent reductions have been made by the tribunal in respect of any property, all other contracts of letting to which the Act applied relating to such property should be referred to the tribunal, made to the tribunal a block reference of 555 flats instead of referring them individually. The landlords thereupon applied for an order of certiorari to bring up and quash the orders made by the tribunal in eight cases and for an order of prohibition to restrain it from proceeding with other references made by the authority. Lord Goddard C.J., referring to the hardships felt by the tenants in obtaining accommodation at that time said that the Act was "designed for the protection of the tenants and not for the penalizing of landlords" and was never intended to provide for general rent fixation throughout the district but to deal with individual cases in which hardship existed or might reasonably be

\[1\] Ibid., at p. 680.
supposed to exist\(^1\). Thus it was held that the action of the authority in referring the whole of the flats to the tribunal when they had not received any complaints from the tenants and had made no enquiry whether or not all the flats were furnished or the tenants were entitled to services rendered by the landlords, and no enquiry whether \textit{prima facie} any one of the rents charged was unfair, was not a genuine exercise of the power conferred on them by the Act, and therefore the reference was wholly invalid.

However, in the absence of any purpose being expressly mentioned, or if mentioned it being of a vague and indefinite description, the courts are less likely to find a ready basis for preventing the abuse of statutory powers. For example, in \textit{Short v. Poole Corporation}\(^2\), a local Education Authority empowered to remove any teacher\(^3\) gave a married woman teacher notice to terminate her engagement as they considered the duty of a married woman

\(^1\) \textit{Ibid.}, at p. 680.

\(^2\) [1926] 1 Ch. 66.

\(^3\) By s. 148, sub-s. 1, of the Education Act, 1921, it was provided that "A local education authority may appoint necessary officers, including teachers, to hold office during the pleasure of the authority, and may assign to them such salaries or remuneration (if any) as they think fit, and may remove any of those officers."
was primarily to look after her domestic concerns and regarded it as impossible for her to do so and also to act effectively and satisfactorily as a teacher at the same time. It was recognised that the discretionary power of the Authority to terminate the engagement was not unlimited and was subject to being declared ultra vires, yet it was said that it was "their duty and within their province to consider whether a certain policy will or will not be a benefit to the cause of education generally". Such a wide view could be taken only because the policy as a benefit to the cause of education could not be pinned down to something specific for the guidance of the Authority. Similarly, in Andrews v. Diprose, where the Director was not to issue a certificate of registration for dairy-produce premises unless he was satisfied that it was in the best interests of the industry that the same be registered, having regard to the situation and environments of the premises, the words "best interests of the industry" were interpreted as including not only the physical attributes of the proposed sites of the premises but also the effect upon the interest of the industry as a whole, covering economic

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1 Ibid., at p. 93. (Italics supplied).
2 (1937) 58 C.L.R. 299.
and commercial interests as well, which the establishment of the premises at that site would have. Moreover, as the burden of proving whether the action was ultra vires lies on the person challenging the action, it becomes all the more difficult for him to prove the abuse of power by reference to a general or vague or indefinite purpose.

It would also be an abuse of power if an authority operates in bad faith even though the challenged Act is "on the face of it, regular and within its power". It has been suggested that bad faith as a ground for invalidating an exercise of power is distinct from that of ultra vires which is supposed to cover only those cases in which the power has been genuinely pursued honestly for an unauthorised or improper purpose. It is submitted that whether a power is exercised honestly or dishonestly is a question concerned with the quality of the act done, and what matters is whether the power has been exercised

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1 See e.g., Bidulph v. Vestry of St George's (1863) 33 L.J. (Ch.) 411; Short v. Poole Corporation [1926] 1 Ch. 66; Werribee Council v. Kerr (1928) 42 C.L.R. 1.
2 Short v. Poole Corporation, supra, at p. 91.
by reference to the legitimate purpose. "But bad faith", said Dixon J. in the Vegetable Seeds Case, "may take the form of falsely avowing a legitimate purpose to cover the actual pursuit of an object outside the scope of the power". It is an abuse of power so long as the purpose pursued is other than the legitimate one irrespective of whether it is honest or dishonest. In the East Elloe Case, there were indications in the opinions of Lord Morton, Lord Reid and Lord Somervell, that the words 'not empowered to be granted' occurring in the Acquisition of Land (Authorisation Procedure) Act, 1946, sect.1, Part 4, para.15, should be interpreted as excluding the abuse of power in bad faith. However, the opinion of Lord Radcliffe sounds more sensible in this respect. His Lordship said:

It is an abuse of power to exercise it for a purpose different from that for which it is entrusted to the holder, not the less because he may be acting ostensibly for the authorised purpose. Probably most of the recognised grounds of invalidity could be brought under this head: the introduction of illegitimate

1 (1945) 72 C.L.R. 37, at p. 83.
3 Ibid., at pp. 862, 863.
4 Ibid., at p. 867.
5 Ibid., at p. 873.
considerations, the rejection of legitimate ones, manifest unreasonableness, arbitrary or capricious conduct, the motive of personal advantage or the gratification of personal ill-will. However that may be, an exercise of power in bad faith does not seem to me to have any special pre-eminence of its own among the cases that make for invalidity. It is one of the several instances of abuse of power and it may, or may not, be involved in several of the recognised grounds I have mentioned 1.

Yet there is a difference in approach between an ultra vires act done in good faith and an ultra vires act done in bad faith. In the former case what is material is the purpose by reference to which the discretion is exercised and the extraneous or ulterior motives do not affect the validity of the act so long as it is exercised for the legitimate purpose. On the other hand, in the latter case the position would be different as the question of bad faith would arise only when the act on the face of it is regular and within its powers, and the courts would require the party challenging the act to establish bad faith by tendering evidence as to the extraneous or ulterior motives, so that truth and falsity of such an allegation could be investigated 2.

1 Ibid., at p. 870.
Thus motives come into consideration only in so far as an act is challenged on grounds of bad faith. However, it is not easy to prove bad faith, because of the difficulty in procuring evidence relating to ulterior motives which led the authority to act in that manner unless the act was manifestly absurd or foolish, e.g., dismissal of a red haired teacher because she has red hair.\(^1\)

In the Vegetable Seeds Case\(^2\), it was alleged that certain orders made by the Vegetable Seeds Committee, in pursuance of a regulation prohibiting the sale of seeds of certain description, were not made bona fide for the purpose for which the power was conferred, i.e., the control and regulation of the processing, treatment, distribution and disposal of seeds, but made for an unauthorised purpose, i.e., the promotion of the trading and financial interests of the Committee. It was held that the orders were open to attack on the ground alleged. However, the case arose on a motion to strike out pleadings. The substantive question was never decided, the case being settled out of court.

\(^1\) Short v. Poole Corporation [1926] 1 Ch. 66, at p. 91.
\(^2\) (1945) 72 C.L.R. 37. See also In re Decision of Walker [1944] 1 K.B. 644, at p. 650.
In case of ultra vires simpliciter\textsuperscript{1}, therefore, it would still be relevant to distinguish between purpose and motive. The court looks to the purpose rather than the motive and it does not matter if the motive is improper provided the purpose is within the statute. For example, in Narma v. Bombay Municipal Commissioner\textsuperscript{2}, the question was whether the compensation to be paid for certain lands acquired under the provisions of the City of Bombay Municipal Act, 1888, was to be calculated according to s.301 of the Act or according to those of the Land Acquisition Act, 1894. By s.297 of the Act the Municipal Commissioner had power to prescribe a regular line on each side of a public street, and if the line was so prescribed that any land not vesting in the corporation fell within it, the Commissioner had, by s.299, power to take possession of it on behalf of the Corporation, the former owner receiving compensation under

\textsuperscript{1} Not including the ground of bad faith.

By s.296 the Commissioner further had power to acquire any land required for widening, extending, or otherwise improving any public street, subject to the payment of compensation under the Land Acquisition Act. Acting within his powers the Commissioner prescribed a line on one side of a public street so that land belonging to the appellants fell within it, and, having served with notice, took possession. The Commissioner wished to acquire the land for the purpose of widening the street in connection with a contemplated bridge carrying the street over certain level crossings. The appellants contended that the procedure under ss. 297, 299 and 301 was inapplicable and the proceedings ultra vires, and that the land could only be acquired subject to payment of compensation under the Land Acquisition Act. The Privy Council held that the powers given by ss. 297 and 299 of the Act could be exercised although the motive of the Commissioner, who acted in good faith and in the discharge of his duties, was not to preserve the line of the street, and that consequently the compensation payable to the appellants was to be calculated according to s.301, and not under the Land Acquisition Act. The Commissioner had power to prescribe the regular line of the street; in form
he purported to do so, and in fact actually did so. "Even if it were proved, as it is not, that the creation and preservation of a regular line was no part of the Commissioner's object, though it certainly was an incidental result of his scheme", Lord Sumner observed that "their Lordships can find nothing in the Act which either entitles the appellants to investigate his motives or has the effect of invalidating his action on account of the purpose, with which in fact he prescribed the regular line of the street" 1.

It is sometimes said that it is of no significance to distinguish between purpose and motive 2. It is not wholly true to go as far as that. Initially purpose is concerned with the end or result desired to be achieved by doing something, whereas motive inspires the doing of something and is distinct from the desired end or result 3.

1 Ibid., at p. 129.
3 See Salmond, Jurisprudence (10th ed.) at pp. 382-384; in this context intention and purpose are identical.
In *R. v. Brighton Corporation, ex.p. Shoosmith*¹, though the motive for the improvement of the road was to induce an automobile club to hold races upon it, the Corporation's action could not be questioned as there was a clear need for the road's improvement at that time. Similarly, in the *Earl Fitzwilliam's Case*², it was argued that the real object of the action of the Central Local Board in acquiring land was to enforce a policy whereby all sales of land would have to take place at existing use values and it went beyond the purpose of disposing of the land for development; but Lord Goddard thought that that would not make the exercise of the powers given to the Board ultra vires.

However, in most cases the actor's conduct is to be determined in terms of 'why'. In such cases, it may not be possible to distinguish between purpose and motive "in so far as states of mind do in fact influence the actor's conduct by causing him consciously to direct his acts towards the attainment of a specific end"³. In *Municipal Council of Sydney v. Campbell*⁴, it was not the

¹ (1907) 96 L.T. 762.
³ de Smith, *loc. cit.*, at p. 197.
the extension of the street but a desire to resell it at a high price (not contemplated by the Act) that influenced the Council in acquiring the land. Here it did not matter whether the desired end or result of reselling the land at a high price was labelled as purpose or motive.\(^1\)

In the *Vegetable Seeds Case* it was suggested that a distinction might be drawn between a representative legislature whose function is legislative rather than administrative, such as Parliament or an elective municipal council, and other bodies which are not directly responsible to the electorate or not subject to political sanctions; and it was only the latter that could be challenged on the ground that it acted on ulterior motives.

"It has not hitherto been held", Latham C.J. said, "that the rule excluding inquiry into the bona fides and motives of legislatures which applies to legislative acts is applicable to such orders (as of the Vegetable Seeds Committee)"\(^2\). Thus motives of a responsible Minister if not done in good faith could be controlled even if Parliament vests in him a discretion in wide terms, such

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as 'if the Minister is satisfied'. Still in the case of an elective municipal council the courts can interfere if its decision on a competent matter is so unreasonable that it might almost be described as being done in bad faith and to that extent "the action of its members must not be founded upon fraud, oppression, or improper motives and a by-law may be quashed if the council in passing it was not using its power in good faith in the interest of the public, but simply to subserve the interest of private persons".

If it could be established that the purpose by reference to which the power has been exercised is the sole purpose, there is not much difficulty in assessing the validity of an Act because if the sole purpose is one authorised by the statute it is valid, and if not it is ultra vires. But when a power is exercised for more than one purpose, authorised and unauthorised inextricably


mixed, the problem becomes complicated. In Sadler v. Sheffield Corporation, a case in which a corporation was empowered to dismiss teachers on educational grounds, it was held that the notices dismissing teachers were bad as the grounds of dismissal were mixed grounds, compounded as to part of financial grounds and to the rest of educational grounds. Lawrence J. said that "the Education Committee would never have attempted, but for the existence of financial reasons" and "if the authority in exercising this discretionary power takes other grounds into account, the power is not well exercised".

In Earl Fitzwilliam's Case, where the board had compulsorily acquired land partly for the authorised purpose of facilitating the collection of development charges and partly also in order to enforce the policy

1) [1924] 1 Ch. 483.
2) Ibid., at p. 505.
4) Section 43 of the Town and Country Planning Act, 1947, provided: (1) The Central Land Board may, with the approval of the Minister, by agreement acquire land for any purpose connected with the performance of their functions under the following provisions of this Act, and in particular may so acquire any land for the purpose of disposing of it for development for which permission has been granted under Part III of this Act on terms inclusive of any development charge payable under those (cont. p. 238).
of restricting the sale at existing use value, there was an implied suggestion in the judgment of Birkett J., contrary to the test applied in Saddler's Case, that the presence of unauthorised purposes might not affect the validity of an act if one of the purposes pursued was an authorised purpose. However, the decision was based mainly on the fact that the enforcement of the policy that land should be sold at a price based on existing use value might have been one of the motives behind the making of the order and "it would not be material and would not be a matter for the court to inquire into". No reference was made to this point on appeal either in the Court of Appeal, or the House of Lords.

(provisions in respect of development. (2) If the Minister is satisfied that it is expedient in the public interest that the Board should acquire any land for any such purpose as aforesaid, and that the Board are unable to acquire the land by agreement on reasonable terms, he may authorise the Board to acquire the land compulsorily in accordance with the provisions of this section ... (4) Any land acquired by the Central Land Board under the provisions of this section shall be disposed of by them in accordance with such directions as may be given to them in that behalf by the Minister, and until the land is so disposed of the Board may manage it in accordance with such directions: Provided that nothing in this section shall be construed as authorising the Board to carry out any development of land acquired by them thereunder."

In the Court of Appeal the majority (per Somervell and Singleton L.J.J.) held the order valid on the ground that the exercise by the board of their powers or compulsory purchase was in connection with their functions as the authority operating the development charge scheme. Denning L.J. in his dissent, determined the legality of the act by reference to the 'dominant purpose'. "If Parliament grants a power to a government department to be used for an authorised purpose, then the power is only validly exercised when it is used by the department genuinely for that purpose as its dominant purpose. If that purpose is not the main purpose, but is subordinated to some other purpose which is not authorised by law, then the department exceeds its powers and the action is invalid". His Lordship did not dispute that facilitating the collection of charges was one of its purposes, but held that the board had another purpose also in order to enforce the sale at existing use value, and as the latter purpose was dominant and at the same time not authorised by the enabling Act, the action was invalid. There seem to be certain difficulties in the application of this test of 'dominant purpose':

(i) The determination of 'dominant purpose' is mainly subjective and the courts would be reluctant to recognise a purpose which is unauthorised or improper as dominant unless it is so conspicuous as to be picked out without any doubt.

(ii) Denning L.J. saw no distinction between purpose and motive: "They are one and the same thing". His Lordship, therefore, applied the test of 'dominant purpose' to a case not involving mixed purposes, but an exercise of power for an authorised purpose mixed with the motive of enforcing their policy of restricting the price at existing use value. It is submitted that courts do maintain the distinction between purpose and motive and their attitude has been to disregard extraneous motives so long as power is exercised for an authorised purpose, unless there is bad faith. Lord MacDermott explained:

In these circumstances it is, in my opinion, beside the point that, in seeking to acquire land for the purpose thus stated, the members of the Board, or some of them, may have been moved by considerations of policy which, in themselves, would not (as I shall assume without deciding) constitute a purpose within the

1 [1951] 2 K.B. 284, at p. 308.
meaning of any part of section 43(1). The short answer to all the submissions as to motive is that, on the facts here, the Board have brought their case within the express terms of the second of that subsection.

(iii) There is some difficulty in reconciling the test of 'dominant purpose' with the one applied in Sadler's Case. If one of the purposes pursued is unauthorised but not dominant, then according to Sadler's Case the order would be invalid because of the extraneous considerations being taken into account, while Denning L.J. would hold the other way.

An approach similar to that of 'dominant' purpose was pursued by the High Court of Australia in Thompson v. Randwick Corporation\(^2\), where it was held that in order to establish that a public authority is acting ultra vires or not, it is not necessary to show that it is activated solely by some unauthorised or improper purpose as was the case in Municipal Council of Sydney v. Campbell\(^3\), but

\(^2\) (1950) 81 C.L.R. 87; see also Minister of Public Works v. Duggan (1951) 83 C.L.R. 424.
\(^3\) [1925] A.C. 338.
it is sufficient that it is motivated substantially by such a purpose. In attempting to resume more land than was required to construct the road, Randwick Corporation was actuated substantially by the purpose of profit making by the sale of land not so required. "It is still an abuse of Council's power", the Court pointed out, "if such a purpose is a substantial purpose in the sense that no attempt would have been made to resume this land if it had not been desired to reduce the cost of the new road by the profit arising from its resale". However, "substantial" is as vague and uncertain as "dominant", as its determination is subjective. Hence the test of "substantial purpose" too is not much help in solving the problem of mixed purposes.

However, the problem is not so complicated as it looks provided the distinction between purpose and motive is kept in mind. Once it is realised that it is only the purpose, not the motive, that is relevant in determining the validity of an act or action (except in the case of bad faith), the question is reduced to the relevancy of purpose or purposes only. A purpose pursued becomes an unauthorised purpose not only because it is not authorised

(1950) 81 C.L.R. 87, at p.106. (Italics supplied).
but also because it influenced the actor's conduct. If there is only one purpose in question, it does not matter as to what extent it influenced the actor's conduct so long as the conduct is influenced by it. Thus the relevancy of purpose does not depend upon the degree of influence caused by it. Similarly if there are two or more purposes, one of them being unauthorised, it seems to be immaterial as to which one of them is 'dominant' or 'substantial' so long as each one of them has influenced the actor's conduct. The presence of an unauthorised purpose would be sufficient for an exercise of power to be invalid, and it should not be affected by the presence of other authorised purposes even though the latter may be 'dominant' or 'substantial'. The same logic may also be applied to the suggestion of Birkett J., which brushes aside the presence of an unauthorised purpose completely if one of the purposes pursued is an authorised one.

III

Extraneous or Irrelevant Consideration

Another limiting principle in relation to the exercise of discretionary powers by local authorities is
that "if, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to these matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard these irrelevant collateral matters"¹. Thus an exercise of discretion on grounds which are extraneous or irrelevant to its purpose would be ultra vires. The concept of relevancy or irrelevancy is well illustrated in Marshall v. Blackpool Corporation². S.62 of the Blackpool Improvement Act, 1879, provided that every person must take permission from the corporation before he could construct a communication for horses or vehicles across


any footpath so as to afford access to his premises from a street. On an application by a person to construct such a communication, the question arose whether the corporation was limited to considering the matters specified in the section - the particular place where, and the details how, the work would be carried out, or whether it could consider other matters such as the safety of the public, and the nature of the user. It was held by the Court of Appeal that the corporation was entitled to consider the safety of the public and the convenience of pedestrians and vehicular traffic, but at the same time it should not have regard to the powers which it hoped to obtain under the proposed Town Planning Scheme. Here public safety and convenience of traffic were regarded as relevant considerations, while any reference to the Town Planning Scheme was irrelevant.

If the nature of the power conferred on an authority is misconceived and the discretion thereupon is exercised by taking into account considerations not contemplated by the statute, the act would be ultra vires even though the authority acted with complete good faith. In Estate and Trust Agencies (1937) Ltd v. Singapore

1 Ibid., at pp. 353, 354.
Improvement Trust\textsuperscript{1}, the action taken by a Board constituted by the Singapore Improvement Ordinance 1927, and entrusted with the duty of carrying out the provisions of the Ordinance, was held \textit{ultra vires} because it misinterpreted s.57 of the Ordinance under which it made a declaration that particular buildings were unfit for human habitation. S.57 of the Ordinance provided: "Whenever it appears to the Board that within its administrative area any building which is used or is intended or is likely to be used as a dwelling place is of such a construction or is in such a condition as to be unfit for human habitation, the Board may by resolution declare such building to be insanitary". The Privy Council said that the Board adopted a wrong and inadmissible test in applying standards as to light or ventilation or conveniences, and in not making "a single reference to those matters which generally render a house unfit for human habitation, such as a structure which is unsafe, a verminous condition of the materials, a pestiferous atmosphere, a state of things dangerous to health, or such a rotten or decayed condition of the building that rebuilding will be cheaper than extensive repair"\textsuperscript{2}. It was, therefore, said that the

\textsuperscript{1}[1937] A.C. 898.
\textsuperscript{2}Ibid., at p. 916.
grounds on which the Board made the declaration were
grounds which did not justify the declaration. A similar
problem arose in R. v. Connell; ex parte the Hetton
Bellbird Collieries Ltd¹, as to the meaning of the word
"anomalous" occurring in the National Security (Economic
Organization) Regulations. Reg. 17(i)(b) provided that
an Industrial Authority might alter any rate of remunera­
tion "with the approval of the Minister, if the Industrial
Authority is satisfied that the rates of remuneration ... are anomalous". It was held that an Industrial Authority
was not "satisfied" within the meaning of that regulation,
so as to found its authority to alter existing rates
upon a misconstruction of the regulation. The desirability
of having a new and uniform provision was not sufficien­
to justify an anomaly; it must be shown that the rates in
question were incongruous with an existing rule².

If a statute conferring a discretionary power
expressly states the considerations to be taken into

¹ (1944) 69 C.L.R. 407.

² McTiernan J. disagreed with other members of the High
Court in that "where the Industrial Authority is duly
satisfied that a rate of remuneration is anomalous it is
not for this Court in prohibition proceedings to hold
that the condition necessary to jurisdiction was fulfilled,
even if the Court thought there was no anomaly, but the
Industrial Authority was satisfied that there was": ibid.
at p. 450.
account, there is not much difficulty in examining the validity of an act on grounds of extraneous or irrelevant considerations. However, it is not usually the case, and the task of courts is then to identify relevant considerations implied in the terms of the statute, and to distinguish them from the extraneous or irrelevant ones. So far it has not been possible to formulate any principle or criterion because "the questions, what are, and what are not, legitimate considerations ... must always be disputable and open to wide differences of opinion"¹.

In Theatre de Luxe (Halifax) Ltd v. Gledhill², a condition was imposed by a licensing authority having power to grant licenses for cinematograph performances under the Cinematograph Act, 1909, to the effect: "Children under fourteen years of age shall not be allowed to enter into or be in the licensed premises after the hour of 9 p.m. unaccompanied by parent or guardian. No children under the age of ten years shall be allowed in the licensed premises under any circumstances after 9 p.m." The majority held that the condition was ultra

¹ R. v. Trebilco; ex parte F.S. Falkiner & Sons Ltd (1936) 56 C.L.R. 20, at p. 32, per Dixon J.
² [1915] 2 K.B. 49.
vires in as much as there was no connection between the ground upon which the condition was imposed, namely, regard for the health and welfare of young children generally, and the subject-matter of the license, namely, the use of premises for the giving of cinematograph exhibitions. Atkin J. dissenting, was of the opinion that one of the conditions imposed on the grant of licenses must be in relation to the public interest, and in so far as children were affected, the authorities were justified in imposing that condition. However, it is Atkin J.'s opinion that appears to have prevailed (though not mentioned) in R. v. London County Council; ex parte London and Provincial Electric Theatres Ltd1. There it was held that a council acting under the Disorderly Act, 1751, and the Cinematograph Act, 1909, could refuse to grant the renewal of music and cinematograph licenses on the ground that the large majority of its shares were held by alien enemies. Lord Reading C.J. said:

The Council in these matters are the guardians of public interest and welfare. If the Council are of the opinion that the exhibition of cinematograph films accompanied by music should not be entrusted to a company so largely composed of persons whose interest and whose desire at the present time is or may be to

inflict injury upon this country, can it be held as a matter of law that the Council have travelled beyond the limits allowed to them. I think not. I cannot hold that such considerations are extraneous or extra-judicial".1

This attitude entitling authorities to consider matters of public interest, was also adopted in Harman v. Butt2. Acting under the Sunday Entertainments Act, 1932, an authority having power to grant licenses under the Cinematograph Act, 1909, allowed a cinematograph theatre to be opened and used on Sundays subject to the condition that no child under the age of sixteen should be admitted. It was held that the condition was not ultra vires. Atkinson J. said: "I am satisfied that the defendants were entitled to consider matters relating to the welfare, including the spiritual well-being, of the community and any section of it, and I hold that this condition ... is not ultra vires on the ground that it is not confined to the user of the premises by the licensee, but relates to the interest of a section of the community".3

Thus, though the Halifax Case was not overruled, the scope of its application was considerably narrowed down

1 Ibid., at pp. 475, 476.
2 [1944] 1 K.B. 491.
3 Ibid., at pp. 499, 500.
by pointing out that the Act of 1932 gave an unlimited discretion as the license could be granted "subject to such conditions as the authority think fit to impose", a ground additional to that granted in the Act of 1909. This view is strengthened by the fact that Harman v. Butt was referred to with approval in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation\(^1\), where "the well-being and the physical and moral health of children" was considered as a matter which the authority was competent to consider. "No-body, at this time of day", said Lord Green M.R., "could say that the well-being and the physical and moral health of children is not a matter which a local authority, in exercising their powers, can properly have in mind when those questions are germane to what they have to consider"\(^2\).

The wider the discretion, the less possible it becomes to identify relevant considerations. The tendency has been to confer discretion in general terms such as "if the authority thinks fit", and the judicial attitude has not been uniform in indicating the grounds upon which

\(^1\) [1948] 1 K.B. 223.
\(^2\) Ibid., at p. 230.
the discretion is exercisable. In *Roberts v. Hopwood*,
Lord Sumner was of the view that a local authority acted for a collateral purpose, if it fixed by standards of its own on social grounds a minimum wage for all adults, and was not in so doing acting for the benefit of the whole community. Whereas a reference to social or economic policy was discouraged in *Re Decision of Walker*, a case in which payment of certain wages was again the question. Goddard C.J. said that so long as a particular result arrived at was prima facie reasonable, it was irrelevant how and why that result was arrived at. But he thought that the courts could disallow an exercise of power by reference to some policy of social reform if the limit of reasonableness was exceeded as in *Roberts v. Hopwood*. However, in *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation*, it was clearly said that the Court was not to act "as an appellate authority to override a decision of the local authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of

1. [1925] A.C. 578; see also *Attorney-General v. Tynemouth Union* [1930] 1 Ch. 616, 625.
the powers which Parliament has confided in them"\(^1\). Thus it was thought unnecessary to define the limits of relevant factors so long as the local authority was acting "within the four corners of their jurisdiction"\(^2\).

As to the decision in *Roberts v. Hopwood*, it was explained that there the wages were fixed "not by reference to any of the factors which go to determine a scale of wages, but by reference to some other principle altogether"\(^3\).

But *Prescott v. Birmingham Corporation*\(^4\) seems to have revived the spirit of *Roberts v. Hopwood*. In that case a local authority empowered to charge fares on its buses "as it should think fit"\(^1\) arranged for free transport for certain classes of aged persons, the corporation paying to the transport fund each year a sum equivalent to the estimated cost of the scheme to the transport undertaking. The Court of Appeal held that the scheme went beyond anything which could reasonably be regarded as authorised by the discretionary power of fixing fares

\(^1\) *Ibid.*, at p. 234.
and was accordingly ultra vires the corporation. The local authority was regarded as owing a fiduciary duty to ratepayers and as such it might not make free gifts to a favoured class of persons at the expense of ratepayers "on benevolent or philanthropic grounds". The Court took notice of the fact that the undertaking was a business venture but said that it should not be guided by considerations of profit only to the exclusion of all other considerations. This sort of reasoning, if not understood as merely applicable to a corporation owing "an analogous fiduciary duty" could pave a way for a fairly wide judicial discretion to overrule the judgment of local authorities.

It has been a matter of construction depending upon the nature and character of the terms of the power conferring discretion upon an authority and also the scope and general operation of the legislation. In R. v. Australian Stevedoring Industry Board; ex parte Melbourne Stevedoring Co. Pty Ltd, in spite of the evident discretion given to

1 Ibid., at p. 235. A similar reasoning was applied in Attorney-General v. Tynemouth Union [1930] 1 Ch. 616, at p. 637, in which Eve J. said that the position of the Guardians, under the Relief Regulation Order, 1911, in relation to the rate-payers was of a fiduciary character, and they certainly could not make a present of the outstanding debts to the borrowers at the expense of the rate-payers.

the Stevedoring Industry Board to act "as it thinks fit" by the High Court did not accept the Board's "attitude" or policy in invoking the section as a means of enforcing upon employers a duty to prevent workers from leaving work prematurely and to report their absence to the Board. Under s.23(1) of the Stevedoring Industry Act, the Board had power to cancel or suspend registration if, after such inquiry as it thought fit, it was satisfied that an employer (a) was unfit to continue to be registered as an employer, (b) had acted in a manner whereby the proper performance of stevedoring operations had been interfered with, or (c) had committed an offence against the Act. The Court recognised that in such cases no legal ground for attacking the exercise of power arose merely because the authority might come to an erroneous conclusion of fact or proceed on the meagre or unconvincing evidence. But as a matter of law the authority must understand correctly the test laid down in the relevant legislation and correctly apply it. "It is only when the Board or its Delegate is satisfied of the existence of facts which do amount in point of law to what the section means by unfitness or by acting in a manner whereby the proper performance of stevedoring operations is interfered with that the Board or its Delegate reaches a position where
one or other of them may lawfully exercise the authority which s.23(1) purports to bestow". The Court was of the view that under the circumstances fitness connoted suitability, appropriateness, qualification of an employer and as such "the scope of s.23(1)(a) has been misconceived and suspension or cancellation of registration is in contemplation not by reason of unfitness but as a sanction to enforce the obligation laid upon stevedores registered as employers, the obligation of closely supervising and disciplining the member of the gangs".

At the same time, the correctness or incorrectness of the conclusions reached by an authority cannot be questioned in a court unless they have in truth been actuated by extraneous or irrelevant considerations. In R. v. Trebilco; ex parte F.S. Falkiner & Sons Ltd, upon an application for relief for taxation under the Land Tax Assessment Act in respect of the years ending June 1932 and 1933 on the grounds that the return from the taxpayer's land had been seriously impaired and the

1 Ibid., at p. 466.
2 Ibid., at p. 469, per Dixon C.J., Williams, Webb and Fullagar JJ.
3 (1936) 56 C.L.R. 20.
exaction of the full amount of tax would entail serious hardships, the Board took into consideration the fact that in 1934 there had been a substantial profit and in 1935 only a small loss, and on that basis refused the application. It was urged that the board, in making its decision, considered extraneous matters, namely the financial position of the taxpayer in 1934 and 1935. Latham C.J. said that as the board was entitled to take into account any facts affecting the financial position of the applicant at the time when the application was considered, there was no ground for limiting the relevant considerations by reference to the year in which the facts occurred upon which the applicant relied. However, the board would have taken into account extraneous considerations if the circumstances had no relation whatever to the position of the applicant as a taxpayer or to his financial capacity or to land taxation - such as, for example, the fact that the applicant was engaged in some occupation of which the board disapproved.

If a local authority or a board do not state reasons for their decision, it is well nigh impossible for the aggrieved party to bring a case before the court on
grounds of extraneous or irrelevant considerations. For example, in *Land Realisation Co. Ltd v. Post Office*, acting under the Acquisition of Land (Authorisation Procedure) Act, 1946, and the Town and Country Planning Act, 1947, the Post Office in pursuance of certain orders the validity of which the plaintiffs impeached, signed an authorisation to acquire land which the plaintiffs owned, and entered into possession. The authorisation was held valid by the court even though no reasons were given for the decision. "It is well settled", Römer J. remarked, "that where a statutory provision empowers a minister to do something which he is satisfied is necessary having regard to a certain state of affairs, a statement by him that he is so satisfied will be accepted in these courts". In *Pilling v. Abergele U.D.C.*[^1^], Lord Goddard C.J. said that he could examine the validity of the discretion exercised by a local authority only because they stated reasons for their decision.

[^1^]: However, the allegation of bad faith could still be investigated: e.g., *Carltona Ltd v. Commissioner of Works* [1943] 2 All E.R. 560, at pp. 563, 564.
[^3^]: Ibid., at p. 1067.
But in Australia, the courts would make inquiries whether the opinion required by the relevant legislative provision has really been formed, and would not leave it to the satisfaction of the authorities. Latham C.J. once explained: "Where the existence of a particular opinion is made a condition of the exercise of power, legislation conferring the power is treated as referring to an opinion which is such that it can be formed by a reasonable man who correctly understands the meaning of the law under which he acts. If it is shown that the opinion actually formed is not an opinion of this character, then the necessary opinion does not exist. A person acting under a statutory power cannot confer upon himself by misconstruing the statute which is the source of his power"\(^1\). In _Carbines v. Powell\(^2\), Reg. 92 of the Wireless Telegraphy Regulations, which provided that "No person or firm shall manufacture ... equipment for use as broadcast receivers, or for use in those receivers, until he has been granted a dealer's license", etc., was held beyond the power conferred by s.10 of the Wireless Telegraphy Act, 1905-1919 (CWLth), upon the Governor-

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2. (1925) 36 C.L.R. 88.
General to make regulations not inconsistent with the Act "prescribing all matters which by the Act are required or permitted to be presented for carrying out or giving effect to the Act", as the Act related only to conduct involved in transmitting and receiving messages and not the manufacture of such equipment. An authority "cannot under the guise of giving better effect to the provisions of a statute extend the statute to the prohibition or restraint of trades which are not included in the statute".

Similarly a power expressed in terms of necessary and/or convenient or expedient, is not unlimited in its operation but is confined to the making of regulations incidental to the administration of the statute. It would not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature

1 Ibid., at p. 92, quoted from Rossi v. Edinburgh Corporation [1905] A.C. 21, at p. 29, per Lord Davey.
has adopted to attain its ends. In Shanahan v. Scott\(^1\), the validity of a regulation, made in pursuance of such a power, forbidding the placing or causing to be placed all eggs, whether vested in the board and already marketed\(^2\) or not, except with the consent of the board, was held ultra vires the Act as it was not within the scope and general operation of the legislation which was to give the board control of eggs with a view to marketing them. It was an attempt not to complement but to supplement the plan of the legislation by extending it to the use, handling or disposition of eggs, which was independent of the board's marketing of the eggs vested in or otherwise acquired by the board\(^2\).

\(^1\) (1957) 96 C.L.R. 245. See also Chesterman v. Federal Commissioner of Taxation (1923) 32 C.L.R. 362; Carbin v. Powell (1925) 36 C.L.R. 88; Broadcasting Co. of Australia Pty Ltd v. Commonwealth (1935) 52 C.L.R. 52; Grech v. Bird (1937) 56 C.L.R. 228; Morton v. Union Steamship Co. of New Zealand Ltd (1951) 83 C.L.R. 402; Australasian Jam Co. Pty Ltd v. Commissioner of Taxation (C'th) (1953) 88 C.L.R. 23.

But "in an Act of Parliament which lays down only the main outlines of policy and indicates an intention of leaving it to the Governor-General to work out that policy by specific regulation, a power to make regulations may have a wide ambit. Its ambit may be very different in an Act of Parliament which deals specifically and in detail with the subject-matter to which the statute is addressed."; Morton v. Union Steamship Co. of New Zealand Ltd. (1951) 83 C.L.R. 402, at p. 410.

\(^2\) Ibid., at p. 254.
However, in Morton v. Union Steamship Co.\(^1\), the High Court pointed out that the scope of such regulation-making powers (e.g., in pursuance of "necessary and convenient" clause) varied from statute to statute. If the statute is in "skeleton" form, laying down only a few general principles, then regulation-making power under such a clause would be correspondingly wide. But when the Act contains detailed series of provisions, the "incidental" regulation-making power will be correspondingly narrow.

IV

Unreasonableness\(^2\)

Though a by-law may be literally within its powers, it could still possibly be declared ultra vires if it is unreasonable in its application\(^3\). However, it must be

\(^1\)(1951) 83 C.L.R. 402.

\(^2\)See generally de Smith, loc. cit., at pp. 214-221; Griffith and Street, Principles of Administrative Law (2nd ed.), at pp. 112-115.

\(^3\)It has been asserted as warranting that anyone exercising a discretion "must by use of his reason, ascertain and follow the course which reason directs": per Lord Wrenbury in Roberts v. Hopwood [1925] A.C. 578, at p. 613; see also Attorney-General v. Tynemouth Union Guardians [1930] 1 Ch. 616; Prescott v. Birmingham Corporation [1955] Ch. 210.

unreasonable in the sense that the authority "have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it". The courts ought not to be astute to find possible difficulties or grievances to which the administration of a by-law might give rise and it ought to be supported unless it is manifestly partial and unequal in its operation between different classes, or unjust, or made in bad faith, or clearly involving an unjustifiable interference with the liberty of those subject to it. Thus in *Kruse v. Johnson*, a law forbidding a person from playing any musical instrument or singing in any public place or highway within fifty yards of any dwelling house was held reasonable. "A by-law is not unreasonable", said Lord Russell, "merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there". It was further observed that the court ought


3 *Kruse v. Johnson*, supra, at p. 100.
to be slow to condemn as invalid any by-law on the ground of supposed unreasonableness and apply to it a benevolent interpretation, an approach different from the one applied to the powers of "railway companies, or other like companies which carry on their business for their benefit" and the courts "guard against their unnecessary or unreasonable exercise to the public disadvantage"\(^1\). Thus the ground of "unreasonableness" has virtually been reduced to the consideration of extraneous or irrelevant factors\(^2\).

In Australia, "unreasonableness" is not regarded as an independent ground for invalidating a by-law. There was a suggestion of treating it that way in an early Victorian case\(^3\) but this was overruled subsequently by the High Court\(^4\). In Williams v. Melbourne Corporation\(^5\),

\(^1\) Ibid., at p. 99. See also R. v. Roberts; ex parte Scurr and Others [1924] 2 K.B. 695, at pp. 719, 721, 726-7.


\(^3\) Gunner v. Helding (1902) 28 V.L.R. 303, at p. 321.


\(^5\) (1933) 49 C.L.R. 142.
acting under the Local Government Act 1928 (Vic.), a local authority made a by-law preventing cattle from being driven in certain streets of the city except during certain hours. The by-law being challenged on the ground of unreasonableness, the High Court remarked that it was not a separate and distinct ground of invalidity; the material question raised by such a submission was whether, notwithstanding that on its face it related to traffic, the operation of the by-law was such that it could have no reasonable relationship to the purpose for which the power to make by-laws was granted. If it could not reasonably have been adopted as a means attaining the end of the power, it would be invalid not because it was expedient or misguided, but because it was not a real exercise of the power. The by-law being within the powers conferred upon the corporation, was, therefore, held to be valid.

In Footscray v. Maize Products Ltd, and Brunswick Corporation v. Stewart, there were indications that the power to hold a by-law void on grounds of 'unreasonableness'

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1 Ibid., at p. 155.
2 (1943) 67 C.L.R. 301, at pp. 309-311.
3 (1941) 65 C.L.R. 88, at pp. 97, 99.
still existed, though the by-law should be "so oppressive or capricious that no reasonable mind can justify it". But such a case would invariably embrace other grounds of invalidity, particularly bad faith, covered by ultra vires. The present law may thus be stated in the words of Stanley J. in Englart v. Walker; ex parte Englart: "The court should not hold a regulation invalid on the ground of unreasonableness if ex facie it is within the scope of the power to make regulations, unless it is so oppressive or capricious that no reasonable mind could justify it as an exercise of those powers. It would then become a mere abuse, and not a real exercise of power".

However, in the United States "unreasonableness" is a much broader ground for invalidating a by-law, or a regulation, than in England. For example, in Yick Wo


2 In the United States both by-laws and regulations (unlike in England) may be declared as ultra vires on the ground of "unreasonableness": e.g. Manhattan General Equipment Co. v. Commissioner (1936) 297 U.S. 129. In an appeal from New Zealand the Privy Council also held departmental by-laws invalid for "unreasonableness": R. v. Broad [1915] A.C. 1110.

v. Hopkins\textsuperscript{1}, the Supreme Court invalidated a municipal licensing ordinance which, though valid in form, applied in an unreasonable and arbitrary manner so as to discriminate against Asiatics. "Though the law itself be fair on its face and impartial in appearance", said Justice Mathews, "yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibitions of the Constitution\textsuperscript{2}. Thus even in judging of the 'unreasonableness', wherever that is relevant, the court may look not merely to the wordings of a by-law or regulation, but its actual effect in practice.

\textsuperscript{1} (1886) 118 U.S. 356.

\textsuperscript{2} Ibid., at p. 373.
CHAPTER VII

Supervisory Jurisdiction

The doctrine of ultra vires, as noticed earlier, enables the courts to keep the exercise of powers conferred on administrative authorities within the bounds of the law, and thus exercise supervisory jurisdiction over them against excessive or abusive exercise of power. This jurisdiction is normally exercised through the issuing of prerogative writs, mandamus, prohibition or certiorari, or the granting of injunctions or declaratory judgments against the authorities.


2 Under supervisory jurisdiction an exercise of discretionary power cannot be impugned on the ground that it was erroneous in law or in fact unless the error goes to its jurisdiction, or is apparent on the face of it, or is so flagrant as to justify a finding that the authority must have misconceived or misused its powers: Healey v. Minister of Health [1955] 1 Q.B. 221, at pp. 227-8. Also the right of appeal is not included; courts are entitled to exercise appellate jurisdiction only when authorised by the statute: see de Smith, Judicial Review of Administrative Action (1959), at p. 170.

3 Also refer to Administration of Justice (Miscellaneous Provisions) Act, 1938 (British).
If a legislature takes away the supervisory jurisdiction altogether in clear and unambiguous terms, courts would become helpless in exercising any control over the actions of administrative authorities. But the tendency has been to bar judicial control by the insertion of expressions such as privative clauses or analogous provisions, so that it is not easy to draw any conclusion whether the exercise of the discretionary power is justiciable or reviewable, and, if so, to what extent and on what grounds. However, legislatures do not intend that the powers so conferred should be exceeded or abused, and in the absence of anything contrary to that effect courts do retain their jurisdiction. It is, therefore, primarily a matter of construction, and it is for the courts to say whether they have been deprived of their jurisdiction. To the extent that judicial control is ousted, the operation of our maxim is restricted. But to the extent that Courts resist or restrict the operation of privative clauses, they may be said to be putting our maxim into effect.

Privative Clauses

In Colonial Bank of Australasia v. Willan\(^1\), the Privy Council held that a privative clause to the effect that no proceedings before the Court of Mines should be removed into the Supreme Court, was ineffective to take away certiorari\(^1\) in the case of "a manifest defect of jurisdiction" or "manifest fraud". Review on the ground of fraud\(^2\) is further evidenced by the decision in Lazarus Estates Ltd v. Beasley\(^2\), where it was held that the time of challenging the validity of the declared value of repairs in the County Court within twenty-eight days of receiving the notice of increase of rent as provided in the Housing Repairs and Rent Act, 1954\(^3\), was

\(^1\) (1874) L.R. 5 P.C. 417.
\(^2\) [1956] 1 Q.B. 702.
\(^3\) Sch.II, para.4: "(1) Within twenty-eight days after the relevant date the tenant may apply to the county court to determine whether work of repair has been carried out on the dwelling-house during the period specified in the declaration to a value not less than that so specified..."

Para 5: "Subject to the provisions of the last foregoing paragraph, the service with a notice of increase of such a declaration as is required by this Schedule shall be treated ... as the production of satisfactory evidence that work has been carried out ...; and subject as aforesaid the validity of a declaration shall not be questioned on the ground that the value of the work of repair stated in the declaration to have been carried out on the dwelling-house is less than that required by the foregoing provisions of this Schedule."
not applicable to fraudulent declarations, for "fraud" vitiated all transactions known to law and the landlord could not recover increased rent by reason of "fraud". But in Smith v. East Elloe R.D.C.¹, the House of Lords by excluding challenge directed against bona fides put the gear in the reverse direction, surprisingly at a time when the tendency of courts was to retain or even extend rather than surrender their supervisory jurisdiction². S.15 and s.16 of the Acquisition of Land (Authorisation Procedure) Act 1946 provided that orders for the compulsory acquisition of land shall be open to challenge only within six weeks of their confirmation and thereafter "shall not ... be questioned in any legal proceedings whatsoever". In an appeal by the owner of the land from an order of the Court of Appeal affirming an order of the lower court whereby it was ordered that the writ in an action by the appellant against the respondents, East Elloe U.D.C., etc., and all subsequent proceedings be set aside, the majority (Lord Reid and Lord Somervell dissenting) held that para. 16 ousted the jurisdiction of the courts to try issues whereby the validity of compulsory

¹ [1956] 1 All E.R. 855.
² de Smith, Judicial Review of Administrative Action (1959) at pp. 227, 228.
purchase orders was brought into question after the period of limitation had expired, notwithstanding earlier dicta (applied by the dissentients) that recovery for fraud could be barred only by express words. The words used in the privative clause were given literal interpretation. Viscount Simonds said:

They do not override the first of all principles of construction that plain words must be given their plain meaning. There is nothing ambiguous about para. 16; there is no alternative construction that can be given to it; there is, in fact, no justification for the introduction of limiting words such as "if made in good faith", and there is the less reason for doing so when those words would have the effect of depriving the express words "in any legal proceedings whatsoever" of their full meaning and content.¹

This type of clause, then, seems even more effective in ousting judicial control than the more explicit privative clauses, which are less commonly used in England than in Australia.

In Australia it is a common practice to insert privative clauses in most of the statutes conferring powers on administrative authorities and the High Court

1 Ibid., at p. 859. These remarks may also be extended to an analogous expression "shall not be questioned in any Court of law", e.g., s. 26 of the British Nationality Act, 1948.
has followed a fairly consistent approach to their
collection. For example, in *R. v. Hickman; ex parte
Fox and Clinton*\(^2\), there were two orders nisi for prerog­
tative writs of prohibition directed to the chairman and
members of a Local Reference Board established under the
National Security (Coal Mining Industry Employment)
Regulations. The writs were sought to prohibit the Board
from proceeding further upon certain orders made by it.
The question had arisen whether awards governing certain
employees, including lorry drivers, in the coal mining
industry, applied to the employees of the prosecutors who
were engaged in carrying coal from one place to another.
The Court was of the opinion that they did not fall within
the meaning of the expression "coal mining industry".
But it was further argued that Reg. 17 protected the
decision of the Board from invalidation. Reg. 17
provided that the decision of a Local Reference Board
"shall not be challenged, appealed against, quashed or
\(^1\) See e.g., *Baxter v. New South Wales Clicker's Association*
(1909) 10 C.L.R. 114, at pp. 148 and 162; *Morgan v.
Rylands Bros. (Australia) Ltd* (1927) 39 C.L.R. 517, at
p. 524; *Australian Coal and Shale Employees Federation v.
Aberfield Coal Mining Co. Ltd* (1942) 66 C.L.R. 161, at
p. 177; *R. v. Hickman; ex parte Fox and Clinton* (1945)
70 C.L.R. 598, at pp. 615, 616; *R. v. Murray; ex parte
Proctor* (1949) 77 C.L.R. 387, at pp. 398, 399; *R. v.
Metal Trades' Employer's Association* (1951) 82 C.L.R. 208,
at p. 249.
\(^2\) (1945) 70 C.L.R. 598.
called into question, or be subject to prohibition, mandamus or injunction, in any court of any account whatsoever". It was held that a writ of prohibition lay in respect of a decision of the Board based on an erroneous finding that the matter was within the ambit of that industry. "An authority with a limited jurisdiction", said Latham C.J., "cannot give itself jurisdiction by a wrong determination as to the existence of a fact upon which its jurisdiction depends, or by placing a wrong construction upon a statute upon which its jurisdiction depends, unless by a valid provision the authority is given power to act upon its own opinion in relation to the existence of the fact or in relation to the construction of the statute". Thus where a legislature confers authority subject to limitation and at the same time provides for a privative clause, it becomes a problem of statutory construction, the problem being that of reconciling the intention disclosed in the privative clause with the intention clearly appearing from the

1 Though in the federal sphere there is a constitutional limitation on Parliament's power, contained in s.75(v) of the Constitution, it is a general limitation applicable to privative clauses even in jurisdictions where a law is immune from the constitutional limitation, e.g., State legislation.

2 (1945) 70 C.L.R. 598, at p. 606.
rest of the provisions that the body so authorised shall be of limited powers.

Dixon J. was the only one who took a view which is a sort of compromise between two possible views of privative clauses: the extreme "logical" view which would in effect deny any effect to privative clauses; and the extreme "policy" view which would exclude any judicial interference on any ground whatever. "Such a clause is interpreted as meaning", he said, "that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body"¹.

This view of Dixon J. was adopted by the High Court in R. v. Central Sugar Cane Prices Board². There the matter came before the High Court upon an application

¹ Ibid., at p. 615. (Italics supplied)
for special leave to appeal from an order of the Full Court of Queensland, whereby an order nisi was made absolute for the issue of a writ of prohibition directed to the members of the Central Sugar Cane Prices Board restraining them from proceeding further in a certain application pending before the Central Board to vary an award previously made by it on an appeal from a Local Board. The Court by a majority held that the Central Board in any event acted within power as to the matter in dispute. But as to the privative clause\(^1\) which was sought to protect the awards and proceedings from challenge, Dixon C.J., Kitto and Windeyer JJ., said that since the purported award was reasonably capable of reference to a power belonging to the Central Board, and related wholly to a subject-matter of that power, and was made in a bona fide attempt by the Central Board to exercise the authority given by the Act, its validity was not open to challenge in the present proceedings\(^2\).

\(^1\) S. 17 of the Regulation of Sugar Cane Prices Acts of Queensland; para. (a) makes every such award of the Central Board final and conclusive, and provides that it shall not be impeachable for any informality or want of form, or be appealed against, reviewed, quashed or in any way called in question in any court on any account whatsoever; para. (c) provides in quite general terms that the validity of, inter alia, any award or proceedings of the Central Board shall not be challenged.

However, prohibition or certiorari will issue where the objection to the proceedings is based on some defect in the constitution of the board or tribunal. For example, regulations 12 and 13 of the National Security (Coal Mining Industry Employment) Regulations provided for the constitution of Local Reference Boards and required the presence of a certain quorum at the Board's meetings. In R. v. Murray; ex parte Proctor, an order made by such a Board was challenged on the ground that the Board at the time of making the order was not validly constituted as the required quorum was not present. It was held that the presence of a quorum was a necessary condition of the valid exercise by the Board of its functions, and where a Board purported to act in the absence of a quorum, prohibition would lie notwithstanding regulation 17 which provided that "a decision of a Local Reference Board shall not be challenged appealed against quashed or called into action or by subject to prohibition ... in any court on any account whatsoever". "Regulation 17 is," said McTiernan J., "not effective to bar prohibition against a body which pretends to exercise

1 (1949) 77 C.L.R. 387; see also Magrath v. Goldsborough Mort Co. Ltd (1932) 47 C.L.R. 121.
the jurisdiction which is given to another and different body"\(^1\).

A privative clause may also be construed restrictively if an Act purports to take away the authority of courts to determine citizens' rights. _Downs Transport Pty Ltd v. Kropp\(^2\) is a recent example. There a license issued to the appellant under the State Transport Facilities Act, 1946 to 1955, was cancelled by the Deputy Commissioner of Transport on the ground that he was satisfied that the appellant had contravened a condition of his license. A Judge of the Queensland Supreme Court refused to grant interlocutory injunctions to restrain enforcement of the cancellation until trial of an action; on appeal, the Full Court held that the privative clause in s. 20 of the Act\(^3\)

\(^1\) _Ibid._, at p. 402.

\(^3\) It provides: "No action or legal proceedings whatsoever shall be brought by any person against the Crown, the Minister, the Commissioner, the Deputy Commissioner, the secretary, or any officer or employee of the Commissioner on account of the Commissioner issuing or granting or refusing to issue or grant or cancelling or suspending, or renewing or refusing to renew, or consenting or refusing to consent to the transfer of any license, approval, permit, authority, or certificate whatsoever under any provision of this Act or on account of the Commissioner imposing any term or condition in respect of the issue or renewal of any such document or varying any term or condition of any such document upon its renewal or at any time during its currency; and any court in which such proceedings may be commenced shall have no power or authority to hear or determine any such matter, and shall forthwith dismiss such proceedings."
did not debar the court from determining the validity of the alleged cancellation. Philp J. said that s.20 was designed to prevent actions when the basis of the complaint was the valid cancellation; but here the action was one for a declaration that the cancellation was invalid.

But the courts have recognised formulae such as "shall be judicially noticed and shall not be questioned" as more effective, and thereby practically surrendered their supervisory jurisdiction\(^1\). A notable recent example recognising this fact is found in the decision of the South Australian Supreme Court in Ross Chenoweth v. Hayes\(^2\). Under s.81(1)(f) of the Building Act, 1923-53 (S.A.), Mitchem Council made a by-law prohibiting the construction and alteration of any building used as a factory in certain localities, and further prohibited the use of any building as a factory in those localities. The by-law was certified by the Crown Solicitor pursuant to s.674

\(^1\) See e.g., Anderson v. Wass; ex parte Wass (1935) St.R.Qd. 269; Stewart v. Greacen (1936) Q.W.N. 19; In Re a Solicitor (1953) St.R.Qd. 149; Ross Chenoweth v. Hayes (1955) S.A.S.R. 66. This formula also appeared in several important statutes in England, but it has not yet been tested in courts: see de Smith, Statutory Restriction of Judicial Review (1955) 18 Mod. L. Rev. 575, at p. 585.

of the Local Government Act, 1934-52, and was confirmed by the Governor. It was provided by s.676 of the Act that no by-law in respect of which a certificate of the Crown Solicitor is given pursuant to s.674 "shall be held to be invalid by any court on the ground that it is not a by-law which is within the competence of the Council to make, or that the by-law is contrary to or inconsistent with any provision in force at the date of the said certificate". A company which had erected a workshop and continued to do its business after the by-law was passed, was charged with the breach of the by-law and convicted. On appeal to the Full Bench of the Supreme Court, the question arose whether, on the true meaning and intent of the by-law, it prohibited a use for which the building was erected and used prior to the making of the by-law. The Court was of the view that the Act was clearly prospective in its operation so as not to authorise interference with the use of existing buildings. Yet it was held that as the by-law was certified by the Crown Solicitor, the Court could not, by reason of s.676 of the Local Government Act, declare it invalid. Napier C.J., who delivered the judgment on behalf of the Court said: "But in this case our hands are tied, and we are obliged to stand by, while the process of our Court is
used for the purpose of oppression under the colour of a legal judgment". After a good deal of press and political discussion s.676 was repealed in 1957.

In the Australian federal sphere the High Court is given specific jurisdiction by s.75(v) of the Constitution to issue mandamus or prohibition to federal tribunals, and a privative clause would be of no effect (a) where the tribunal purports to exercise powers which it is beyond the constitutional power of the Federal Parliament to confer on it, (b) where the tribunal, although acting within the field of potential Commonwealth power,


2 It provides: "In all matters ... (v) in which a writ of Mandamus or prohibition or an injunction is sought against the officer of the Commonwealth: the High Court shall have original jurisdiction". For its detailed discussion refer to Anderson, The Application of Privative Clauses to Proceedings of Commonwealth Tribunals (1956) 3 Uni. of Q.L.J. (No.1) at p. 35; refer also to Wynes, Legislative Executive and Judicial Powers in Australia (2nd ed.) at pp. 82-86; Cowen, Federal Jurisdiction in Australia (1959) at pp. 45-51.

3 E.g., conferring of something on the tribunal not covered by ss.51 and 52, or vesting of power of conclusive decision as to questions of law in a tribunal not satisfying s.72 of the Constitution. See also R. v. Commonwealth Court of Conciliation and Arbitration; ex parte Jones (1914) 18 C.L.R. 224; R. v. Kirby; ex parte Transport Workers' Union (1954) 91 C.L.R. 159; R. v. Commonwealth Court of Conciliation and Arbitration; ex parte Whybrow & Co. (1910) 11 C.L.R. 1; R. v. Kelly; ex parte Victoria (1950) 81 C.L.R. 64.
purports to exceed the scope of its statutory authority; (c) where the clear intention of Parliament was that excess of jurisdiction should result in invalidity; (d) where authority to issue mandamus or prohibition is conferred on some other court. On the other hand a privative clause prevents the issue of prohibition for merely procedural defects when a tribunal is dealing with a matter within its jurisdiction.

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1 See R. v. Murray; ex parte Proctor (1949) 77 C.L.R. 387.
2 See R. v. Commonwealth Court of Conciliation and Arbitration; ex parte The Brisbane Tramways Co. (No.1) (1914) 18 C.L.R. 54, at pp. 65, 66; cf. Dixon J. in R. v. Hickman; ex parte Fox and Clinton (1945) 70 C.L.R. 598, at p. 616. In case Parliament does not otherwise indicate so as to delimit or regulate the jurisdiction of a tribunal, the privative clause ought to prevent the issue of mandamus or prohibition, but a 'wrong' decision might still be valid; see Anderson, loc. cit. at p. 45.
3 See the analogy provided by the decision in Bank of New South Wales v. Commonwealth (1948) 76 C.L.R. 1 (H.C.).
According to Dixon J. the operation of a Commonwealth privative clause, apart from the limitations mentioned above, should be taken to have the same effect as a privative clause in State legislation. Thus in order to give full effect to a privative clause, the process of interpretation would be to examine firstly whether "there has been an honest attempt to deal with a subject-matter confided to the tribunal and to act in pursuance of the powers of the tribunal in relation to something that might reasonably be regarded as falling within its province"\(^1\), and secondly whether "particular limitations on power and specific requirements as to the manner in which the tribunal shall be constituted or shall exercise its power are so expressed that they must be taken to mean that observance of the limitations and compliance with the requirements are essential to valid action"\(^2\). The first proposition is not yet endorsed by the High Court as a whole\(^3\), though the second proposition is more

\(^1\) R. v. Murray; ex parte Proctor (1949) 77 C.L.R. 387, at p. 400.
\(^2\) Ibid., at p. 400.
acceptable\(^1\). Further, in view of the considerable scope for individual opinions, it may be said that the law relating to privative clauses is somewhat obscure and needs further clarification.

*As if enacted in the Act*\(^2\)

One of the devices employed to oust the jurisdiction of courts from interfering with the decisions of administrative authorities has been to provide in the enabling Act that the regulations made under the Act "shall have effect as if enacted in the Act". The exact scope of this formula is not very clear due to the contradictory dicta occurring in judicial decisions\(^3\). Moreover, there is also a sharp difference of opinion among various writers\(^4\). One view favours the construction of the clause

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1. Those who support the first proposition also support the second proposition. It is further supported by Latham C.J., with whom Dixon J. joined, in *R. v. Commonwealth Rent Controller; ex parte National Mutual Life Association of Australasia Ltd* (1947) 75 C.L.R. 361, at p. 369. See also Starke J. in the same case at p. 376; and Williams J. in *R. v. Drake-Brockman; ex parte Northern Colliery Proprietors' Association* [1946] A.L.R. 106, at p. 118.


as complete exemption of subordinate legislation from judicial review, whereas the other is in favour of limiting its scope and thus preserving some judicial review of vires. But its discussion is more academic than of any practical importance as it has fallen into disuse in England.

In Australia, this formula did not find favour with the legislatures and there are not many cases in which its scope came up for discussion. In ex parte Heffron, the New South Wales Supreme Court, following Lockwood's Case, held that the court had no power to inquire into the validity of the special rules made under the Coal Mines Regulation Act, 1902 (N.S.W.), as they were to be observed "in the same manner as if they were enacted in this Act". However, it was observed that the rules were intended beyond doubt for the purpose authorised by the Act. Thus it is not clear whether the court would have held the same way if the special rules were established for a purpose not contemplated by the Act. This matter was more fully discussed in Foster v. Aloni and the

1 (1907) 7 S.R. (N.S.W.) 774.
formula was given a restrictive interpretation to the effect that not every purported exercise of the power to make regulations under the Act could pass unchallenged in the courts. S.28(2) of the State Electricity Commission Act, 1928 (Vic.) provided that "all regulations should be published in the Government Gazette and should be laid before both Houses of Parliament and should have like force and effect as if they were enacted in the Act". Upon information the defendant was charged with an offence for having failed to comply with a regulation made under the Act restricting the use of electricity by consumers in accordance with the provisions of an advertisement in the daily Press. The Victorian Supreme Court held that if regulations genuinely purported, without patent irrelevance or absurdity, to be an exercise of one or more of the heads of power granted by the Act upon a matter or matters connected with the purposes for which the Commission as a statutory authority was created to achieve, the court was not called upon to examine whether in any respect the purported exercise of power was too broad, or whether cases might not be imagined falling within the regulations which go beyond the necessity of the occasion.
'Conclusive evidence' clause

The 'conclusive evidence' clause may be the most effective device for ousting the supervisory jurisdiction of courts. In *ex parte Ringer*, it was held that a clause providing that an order made by the Board of Agriculture "shall be conclusive evidence that the requirements of this Act have been complied with and that the order has been duly made and is within the powers of this Act", completely excluded any examination by the courts of the validity of the compulsory purchase order. "The section gave to an order made by a public department the absolute finality and effect of an Act of Parliament. The Court of King's Bench had no power to set aside an Act of Parliament, and it was provided by the section that it should have no more power to set aside an order made by the Board of Agriculture." Thus the courts may be barred from inquiring even when preliminary statutory requirements

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3 Ibid., at p. 719.
have been flouted, once an order or scheme is confirmed by the Minister or some public authority. Such a wide interpretation has not been favourably received and it has been suggested that despite such a clause, the courts could still probe into validity on the ground that an order or a by-law or a scheme did not come within the purposes prescribed by the Act. This suggestion is, moreover, not without support from the courts. But any conclusion as regards the scope of this clause is highly tentative in the absence of authoritative judicial pronouncements.

Thus privative clauses and other analogous formulae that have been devised to oust or exempt the actions of administrative authorities from judicial control have not met with complete success. Such clauses do in some degree restrict the scope of judicial control, but there

1 E.g., the London Traffic Act, 1924; the Judicature Act, 1925.
2 See Committee on Ministers' Powers; Cmd. 4060 (1932); Hewart, The New Despotism (1929), at p. 73; Kier and Lawson, Cases on Constitutional Law (2nd ed.) at p. 143; cf. Willis, The Parliamentary Powers of English Government Departments (1933) at p. 103.
is a strong tendency for the Courts to find a way around privative clauses in what they regard as gross cases of abuse of power.
PART THREE

Some Special Problems of Constitutional Law
CHAPTER VIII

Section 92 of the Australian Constitution

Section 92\(^1\) has become one of the most litigated and controversial problems of constitutional interpretation, mainly because of its phraseology and also perhaps because of its scope being extended to legislation dealing with social and economic problems not anticipated by the framers of the Constitution\(^2\).

The present approach\(^3\) to s.92 gives a limited, though more potential than actual, scope to the application of the principle *what cannot be done directly cannot be done indirectly*, for a law under the guise of regulating something not forming part of trade, commerce and

\(^1\) The first paragraph of the section runs as: "On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States ... shall be absolutely free."


\(^3\) See generally Anderson, Essence, Incidence and Device under Section 92 of the Constitution, (1959-60) 33 Aust. L.J. 294.
intercourse among the States or supplying no element or attribute essential to that conception, may under certain circumstances impair the freedom of trade, commerce and intercourse among the States in the same sense as if "the impairment were achieved by overt or direct means".

The protection extended by s.92 is confined to trade, commerce and intercourse among the States. Similar words also occur in s.51(i) which confers power on Parliaments of the Commonwealth and the States to make laws with respect to trade and commerce with other countries, and among the States. Does it mean that the two expressions in s.92 and s.51(i) respectively carry the same meaning and have identical scope? In McArthur v. Queensland, Knox C.J., Isaacs and Starke JJ., were of the opinion that both must mean the same and that "in both must embrace all that is ordinary comprised within the term trade and commerce when taking place among


2 The word intercourse is not of much significance: Dixon J. in Australian National Airways v. Commonwealth (1945) 71 C.L.R. 29, at p. 82. Cf. R. v. Smithers; ex parte Benson (1912) 16 C.L.R. 99, at p. 113; and Hospital Provident Fund Pty Ltd v. Victoria (1952) 87 C.L.R. 1, at p. 18.

3 (1920) 28 C.L.R. 530, at p. 549.
the States." This view was rejected by the High Court later on for two reasons: "In the first place, the power is to legislate with respect to trade and commerce. The words 'with respect to' ought never be neglected in considering the extent of a legislative power conferred by s.51 or s.52. For what they require is a relevance to or connection with the subject assigned to the Commonwealth Parliament, a conception very different from those which have been employed in the exposition of s.92. In the next place, every legislative power carries with it authority to legislate in relation to acts, matters and things the control of which is found necessary to effectuate its main purpose, and thus carries with it power to make laws governing or affecting many matters that are incidental or ancillary to the subject matter. But this principle is entirely foreign to such a provision as s.92 ...".

Another question arose as to the meaning of the words "absolutely free". In McArthur v. Queensland, these


2 (1920) 28 C.L.R. 530, at p. 549. Also refer to Duncan v. Queensland (1916) 22 C.L.R. 556, at p. 573.
words were supposed to mean as "free from all government-
al control by every governmental authority", but even
such a freedom was qualified as not amounting to a
"privilege to break all other laws". Such a wide meaning
has, however, been rejected, and these words have been
interpreted as not free from every law or regulation.
"All trade and commerce must be conducted subject to law
and this means compliance with a multitude of regulatory
directions" because s.92 "supposes an ordered society
where the mutual relations of man and man and man and
government are regulated by law".

There are certain other matters which may be taken
as settled after the decision of the Privy Council in the
Bank Nationalization Case, as summarised by Dixon C.J. in
his dissenting judgment in McCarter v. Brodie, and quoted
with approval by the Privy Council in Hughes and Vale Pty

1 James v. Commonwealth (1936) 55 C.L.R. 1 (P.C.), at p.56.
2 Bank of New South Wales v. Commonwealth (1948) 76 C.L.R.
1 (H.C.), at p. 389. See also Commonwealth v. Bank of
New South Wales (1949) 79 C.L.R. 497 (P.C.), at p. 639;
Hughes and Vale Pty Ltd v. New South Wales (No.2) (1955)
93 C.L.R. 127 (the Second Hughes and Vale Case), at pp.159,
160, 171; Grannal v. Marrickville Margarine Pty Ltd (1955)
93 C.L.R. 55, at p. 72.
3 Commonwealth v. Bank of New South Wales (1949) 79 C.L.R.
497 (P.C.).
Ltd v. New South Wales (No.1)\textsuperscript{1}: "I do not think that there is any room for doubting that their Lordships have rejected as erroneous three propositions that have often been put forward. The first is that s.92 of the Constitution does not guarantee the freedom of individuals\textsuperscript{3}. The second is that if the same volume of trade flowed from State to State before as after the interference with the individual trader ... then the freedom of trade among the States remained unimpaired\textsuperscript{4}. The third relates to the absence of discrimination. As I understand it their Lordships have rejected the theory that because a law applies alike to inter-State commerce and to the domestic commerce of a State, it may escape objection notwithstanding that it prohibits, restricts or burdens inter-State commerce".

Apart from the general guidance as mentioned above, in ascertaining the validity of a law on grounds of s.92, the present test\textsuperscript{2} may be stated as follows :-

(1) A law which imposes a restriction or burden or liability by reference to or in consequence of a fact or an

\textsuperscript{1} 1955) 93 C.L.R. 1 (P.C.) (First Hughes and Vale Case), at pp. 21, 22.

event or a thing itself forming part of trade, commerce and intercourse among the States, or forming an essential attribute of that conception, essential in the sense that without it you cannot bring into being the trade commerce and intercourse among the States, contravenes s.92, if it creates a real prejudice or impairment to inter-State transactions.

(ii) A law which imposes a restriction or burden or liability by reference to or in consequence of a fact or an event or a thing forming in itself no part of trade, commerce and intercourse among the States and supplying no element or attribute essential to that conception, does not contravene s.92.

(iii) Notwithstanding proposition (ii) mentioned above, a law under the guise of dealing with something which in itself is no part of trade, commerce and intercourse among the States and supplies no element or attribute essential to that conception, may in imposing a restriction or burden or liability contravene s.92.

Looking at these propositions, the first consideration that arises in the ascertainment of the validity of a law is whether the burden imposed by the law is by reference to or in consequence of something which itself forms no
part of trade, commerce and intercourse among the States or forms an attribute essential to that conception. It is, therefore, necessary "to distinguish between on the one hand the features of the transaction or activity in virtue of which it falls within the category of trade, commerce and intercourse among the States and on the other hand those features which are not essential to the conception even if in some form or other they are found invariably to occur in such a transaction or activity". For example, in the Second Hughes and Vale Case, what was prohibited by the New South Wales law was the driving of a vehicle on the highways by a person unless licensed. The driving of a vehicle from one State to another is an essential characteristic of inter-State trade commerce and intercourse. Thus the law imposed a restriction by

1 Hughes and Vale Pty Ltd v. New South Wales (No.2) (1955) 93 C.L.R. 127, at p. 162.

2 See Australian National Airways v. Commonwealth (1945) 71 C.L.R. 29, at p. 89. In Hughes and Vale Pty Ltd v. New South Wales (No.1) (1955) 93 C.L.R. 1, at p. 23, their Lordships quoted with approval from Dixon J.'s dissent in McCarter v. Brodie (1950) 80 C.L.R. 432, at p. 466, thus: "There are tendencies in the Transport Cases to thrust the carriage of goods and persons towards the circumference of the conception of commerce, but in the Airlines Case, 71 C.L.R. 29, it was shown that it must lie at or near the centre."
reference to or in consequence of something which was essential to the concept of inter-State trade etc.¹. On the other hand matters such as "the hours during which a journey is made, what equipment should be carried for emergency or for handling or securing the goods, the axle weight or the wheel weight of the laden vehicle, the relief on a long journey the driver should have, the height or width of the load, the number and position of lights to show the width or the overhang, the crowding of vehicles upon a given route incapable of carrying so many and the means and method of limiting the traffic, the relations within New South Wales of the carrier to the consignor and consignee, the records to be kept and documents to be used, the receipt, safe carriage and delivery of goods"² are only incidents of inter-State transportation and not essential to inter-State trade or commerce. Thus a restriction or burden by reference to or in consequence of something which is an incident to the actual trading or commercial activity does not

¹ Also refer to Russell v. Walter (1957) 96 C.L.R. 177, in which the activity restricted was the inter-State movement of goods; cf. Hughes v. Tasmania (1955) 93 C.L.R. 113.

² Hughes and Vale Pty Ltd v. New South Wales (No. 2) (1955) 93 C.L.R. 127, at p. 163; also refer to Fullagar J. in the same case at pp. 205, 206, and in McCarter v. Brodie (1950) 80 C.L.R. 432, at pp. 495, 496.
infringe s.92. Similarly a restriction or burden by reference to or in consequence of an intra-State activity, e.g., a sale\(^1\), or manufacture of production of a commodity\(^2\), in itself forming no part of inter-State trade etc., does not infringe s.92. It may be that a law under the guise of dealing with such activities, might impair the freedom guaranteed by s.92, but such a consideration arises only after the features of a transaction which involve an element or attribute essential to the concept of inter-State trade etc., and those not involving such an element or attribute have been recognised or characterised.

In order to ascertain whether a certain activity is within the protection of s.92, it should further be examined whether a law has created a real or unreasonable prejudice or impediment to inter-State transactions\(^3\).


For example, the validity of the exercise of a discretion vested in an authority would depend upon the reasonability of its limitations, and a wide and uncontrolled discretion to issue a license for inter-State transport would amount to an unreasonable or real restriction on inter-State trade and commerce because of the difficulties and uncertainty in reading any limitation in respect of the ground of the refusal of the license. A similar problem may arise by way of imposition of a charge or tax on the use of the roads by owners of motor vehicles before they could be driven on roads inter-State. The test of reasonableness or excessiveness in such a case is that "no pecuniary burden should be placed upon it (inter-State

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transportation) which goes beyond a proper recompense to the State for the actual use made of the physical facilities provided in the shape of a highway"\(^1\). At the same time such a law should have uniform application irrespective of the fact whether the journey is inter-State or intra-State, and an unfavourable or discriminatory treatment of inter-State trade and commerce as against intra-State would be regarded as unreasonable irrespective of other considerations\(^2\).

Even though the true solution in solving problems relating to s.92 would be to distinguish between the features of a transaction or activity which are essential to the concept of inter-State trade, commerce and intercourse and those features which are not essential to that conception so that a restriction or burden imposed upon the former might be an infringement of s.92, it does not mean that any imposition of a restriction or burden upon the latter would never be invalid. It would be an


infringement of s.92 "if upon examination of the facts and scrutiny of its intended operation it appears that in spite of the prima facie absence of any but an accidental interference with inter-State trade, commerce and intercourse the law is but a circuitous means of burdening, restricting or impeding operations of a kind which s.92 protects". Thus if a law imposing a restriction or burden upon incidents of inter-State transportation such as the hours during which an inter-State journey is made, the axle weight of the vehicle, etc., creates a real obstruction or impediment to the operation of the inter-State transportation itself, it would be an impairment of the freedom guaranteed by s.92. "For example, a regulation of the hours during which certain goods may be carried upon the Hume Highway or be brought into Sydney or Melbourne may fix times and periods that make the use of motor vehicles for the purpose practically impossible. Such absurdly low limits might be prescribed for an axle load or wheel load that no heavy lifts be permissible".

1 Mansell v. Beck (1956) 95 C.L.R. 550 (the Lottery Case), at p. 565 (Italics supplied); see also Gilpin Ltd v. Commissioner for Road Transport and Tramways (N.S.W.) (1935) 52 C.L.R. 189, at pp. 211, 212; Commonwealth Oil Refineries Ltd v. South Australia (1926) 38 C.L.R. 408, at p. 423.

The 'circuitous means' or 'concealed design' principle is not confined to incidents or accidents of an inter-State activity or transaction but extends as well to matters which are wholly intra-State in themselves, and a prohibition or restriction imposed upon them may, in certain circumstances amount to an impairment or inter-State trade etc. In *Wilcox Mofflin v. New South Wales*¹, dealing with the contention that the compulsory acquisition of hides upon submission for appraisement, or in the case of hides in meatworks upon salting and treating, deprived the owners of their freedom to sell or otherwise deal with the hides in inter-State commerce, it was explained that what was protected from legislative or executive impairment by s.92 was not the ownership of goods or the right to dispose of them but the activities or transactions taking place across State boundaries because of their inter-State character². It is the inter-State dealing, movement, interchange, passage etc. that is the essence of inter-State trade, commerce and

¹ (1952) 85 C.L.R. 488 (the *Hides and Leather Case*).
intercourse. Thus the use of expropriation may validly be made for controlling the marketing of goods because any interference with the ownership is not by reference to or in consequence of something which possesses the characteristics essential to the concept of inter-State trade etc., and therefore, prima facie, not an unconstitutional interference with inter-State trade in these goods. But a law under the guise of expropriation, i.e., dealing with ownership, may in certain circumstances impair that freedom indirectly as "the whole device of expropriating a commodity and vesting it in a marketing board is to intercept commerce and stop domestic or inter-State or foreign trade, as the case may be, or all three".

Thus "there may be many situations where to take a

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trader's goods is inconsistent with s.92. But that depends on **some closer connection** with inter-State trade than the two facts that to engage in inter-State trade is open to him if he chooses and that the goods are his property. The 'closer connection' or circumstances in which the use of expropriation would be inconsistent with s.92, are that the goods must have been either placed in a course of inter-State movement or actually required or intended to be placed in that way. The Court is not concerned with imaginary cases or mere speculative possibilities of inter-State trading occurring and will treat a course of transactions as being intra-State and not protected by s.92 until evidenced by some overt act showing the requirement or intention to carry on inter-State trade.

It would be pertinent "to consider the commercial significance of transactions and whether they form an integral part of a continuous flow or course of trade,"

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2 Ibid., at p. 520.
3 Ibid., at p. 520. See also Grannal v. Marrickville Margarine Pty Ltd (1955) 93 C.L.R. 55, at pp. 79, 80; Carter v. Potato Marketing Board (1951) 84 C.L.R. 460, at p. 485.
which apart from theoretical legal possibilities, must commercially involve transfer from one State to another. Thus in *James v. Cowan* it was held that the compulsory acquisition of dried fruits produced in South Australia imposed a restriction or burden upon the trade that James was actually carrying on in selling dried fruits in other States. Similarly in *Peanut Board v. Rockhampton Harbour Board*, it was the Rockhampton Harbour Board which alleged that all the peanuts in question were conveyed to and delivered at the wharf by the growers and owners thereof for exportation and carriage to Sydney and were within the protection of s.92 from the operation of a Queensland law purporting to establish a complete control of disposal of peanuts grown in Queensland by expropriating them. For the same reason Dixon J. in *Field Peas Case* thought that the plaintiff had an interest in inter-State trade in field peas and therefore had *locus standi* to complain against the operation of the Tasmanian law.

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2 (1932) 47 C.L.R. 386 (P.C.).

3 (1933) 48 C.L.R. 266; see also Carter v. Potato Marketing Board (1951) 84 C.L.R. 460, at p. 480.

providing for the acquisition and marketing of field peas in Tasmania.

A law providing for expropriation of goods may, therefore, be inconsistent or ineffectual only to the extent it prevents an owner from disposing of his goods in inter-State trade. Still to make sure of the validity of a law, one of the ways of satisfying s.92 has been to introduce an exception or severability clause to save as much of the operation of the law as is with respect to acts or transactions which are not in the course of inter-State trade and commerce. In such a case the relevant provisions have to be treated as divisible or distributable as their operation so far as they do not apply to inter-State acts or transactions but are otherwise valid. Generally the presumption is in favour of the validity of a law unless it is found that s.92 protects some transaction or some situation which is not capable of being covered by the exception or severability clause, but such a result again could not be reached on the basis of general reasoning and hypothetical cases. Their Honours in the Hides and Leather Case, referring to the

exception, the evident purpose of which was to prevent acquisition itself operating to impair the freedom to engage in inter-State commerce by means of his right of disposition in the hides, said: "The plaintiffs have not proved in evidence any actual transaction which falls outside sub-s. 2 (the exception) and within s. 92 and is interfered with by acquisition". Of course, if the law is so framed that the inter-State as well as intra-State transactions are so wrapped up together that they cannot be separated from each other, it is wholly invalid.

A restriction on sale may provide another illustration to impair the freedom of inter-State trade etc. by 'circuitous means' or 'concealed design'. A sale by itself is not an inter-State transaction unless it assumes an inter-State character by stipulating the movement of goods to or from some other State in the contract. A sale pursuant to which goods have moved or are required or intended to be moved inter-State, will be within the

2 See Vacuum Oil Co. Pty Ltd v. Queensland (No. 2) (1934) 51 C.L.R. 677; cf. Matthews v. Chicory Marketing Board (1938) 60 C.L.R. 263.
protection of s.92, because a prohibition or restriction imposed upon it would (like expropriation) result in an interference with the right of an owner to dispose of his goods in inter-State trade1. For example, in Cam & Sons Pty Ltd v. Chief Secretary of New South Wales2, the Court granted an injunction only in those cases in which it could be proved that the sale was intended to form part or for the purpose of selling fish to someone in another State. Thus the 'closer connection' or circumstance in this case too is the requirement or intention of the owner to move his goods in inter-State trade (evidenced by overt acts).

Even after the goods have crossed the frontiers of a State or been imported into a State, all sales that take place in the course of distribution to the consumer are still when considered by themselves intra-State transactions3, but a prohibition or restriction imposed

1 McArthur v. Queensland (1920) 28 C.L.R. 530, at pp.559, 560; Williams v. Metropolitan and Export Abattoirs Board (1953) 89 C.L.R. 66, at pp. 74, 75; Wragg v. New South Wales (1953) 88 C.L.R. 353, at p. 385; Cam & Sons Pty Ltd v. Chief Secretary of New South Wales (1951) 84 C.L.R. 442, at pp. 454, 455.
2 (1951) 84 C.L.R. 442.
upon them may result in the impairment of the freedom of inter-State trade etc. Referring to Commonwealth Oil Refineries Ltd v. South Australia, and Vacuum Oil Co. Pty Ltd v. Queensland, Taylor J. said in Wragg's Case:

The destruction of the legislation ... may well be said to have resulted, not because the affected transactions were themselves necessarily part of inter-State trade and commerce, but because the particular burdens imposed were, in the circumstances, considered to be burdens directly imposed upon inter-State trade as such.

What then are the circumstances? Mere economic interdependence of trade and commerce among the States with the domestic trade of a State is not sufficient to justify the application of s.92. "Some closer connection", Dixon C.J. pointed out, "must appear than the interdependence of domestic transactions within a State with the importation which itself amounts to inter-State trade in the commodity".

The circumstances which may ordinarily create a situation so as to impair the freedom of inter-State trade etc., is a prohibition on the first sale of goods.

1 (1926) 38 C.L.R. 408 (the Commonwealth Oil Refineries Case).  
2 (1934) 51 C.L.R. 108 (the Vacuum Oil Case).  
4 Ibid., at p. 386.
after their importation. If the goods are imported into one State from another with the intention of selling them, "their first sale within the second State constitutes so typical and necessary an element that, in its absence, there could never exist any inter-State trade". In *Fish Board v. Paradiso*\(^2\), the defendant was charged with selling fish contrary to a law which required such fish first to be brought to a market and there sold at a sale conducted by the board. Here the restriction or burden was imposed upon a person importing fish for purposes of sale, and therefore the law in effect operated upon the first sales of fish from the moment of their entry into the State. Thus it was held that the law, in so far as it purported to prevent a purchaser of fish in the course of inter-State trade from dealing with it upon its delivery to him otherwise than by placing it at the disposal of the board, had an immediate and direct impact upon inter-State trade.

Similarly the Act held invalid in the *Vacuum Oil Case*\(^3\)

\(^1\) (1934) 51 C.L.R. 108, at p. 134.

\(^2\) (1956) 95 C.L.R. 443.

\(^3\) *Vacuum Oil Co. Pty Ltd v. Queensland* (1934) 51 C.L.R. 108; also refer to the discussion of the case in *Wragg v. New South Wales* (1953) 88 C.L.R. 353, at p. 397; *Williams v. Metropolitan and Export Abattoirs Board* (1953) 89 C.L.R. 66, at pp. 75, 76.
could be regarded as contravening s.92 by 'circuitous means' or 'concealed design'. It prohibited the sale of petrol in Queensland by any person unless licensed, and made the purchase of a certain quantity of locally produced power alcohol a condition of license, but it excluded from the requirement of a license all sellers but the first. As at that time there was no production of petrol in Queensland and it was all imported\(^1\), the burden was placed not on every seller of petrol, but primarily upon that person who introduced petrol into Queensland. Dixon J. said:

> The incidence of the obligation is upon the person importing petrol for sale, and that the burden is placed upon him by reason of a consequence inseparable from his character of importer, namely, that he is necessarily the first person who in Queensland has the commodity in his hands for sale. Inasmuch as he is selected because of this circumstance, he is, in substance burdened in his character of importer, that is, because it is he who introduces the goods into Queensland for sale.\(^2\)

It may be noted that the Act was not framed in such a way as explicitly to deal with sales by the importer as such, but because of certain circumstances, it, in effect, dealt with the first sale by the importer of petrol. In this respect the facts of the *Commonwealth Oil Refineries*

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\(^1\) *Ibid.*, at p. 123.
Case were simpler in that the tax was levied straight away upon the introduction of petrol into South Australia from other States, and the burden attracted by the first sale of petrol in South Australia or by its use in that State was regarded as a tax on the goods in the importer's hands.

In the Margarine Case, though the operation of production or manufacture of a commodity was said as not in itself to be part of inter-State trade etc., it was not denied that it might, under certain circumstances, be used to interfere with the freedom of inter-State commerce. Such circumstances were recognised by the Victorian Supreme Court in McNee v. Barrow Bros. Commission Agency Pty Ltd. In that case a company was charged with a contravention of a regulation which provided that no person shall, without the consent of the Board, convert eggs into whole egg pulp. The company carried on the business in Melbourne of wholesale dairy produce merchant and in the course of that business imported eggs, both sound and cracked, from New South Wales. The

1 Grannal v. Marrickville Margarine Pty Ltd (1955) 93 C.L.R. 55, at p. 79; also refer to the arguments of the defendants: ibid., at p. 62.
cracked eggs, together with those cracked in transport 
or in re-grading on arrival in Melbourne, were intended for 
pulping and resale as egg pulp, while the sound eggs were 
resold as eggs, except that in the "flush" season certain 
of these were also pulped. The cracked eggs were unfit 
for storing and could be used only for pulping. The 
Court held that as to the cracked eggs imported as such 
for the purpose of pulping, the regulation was invalid 
as it contravened s.92 of the Constitution. It was so 
because of the presence of certain circumstances in that 
the "cracks" were imported only for the purpose of 
pulping, and a restriction or prohibition upon pulping 
would have consequences upon the importation of "cracks".

There are certain operations such as 'receipt' and 
'delivery' of a commodity which when considered by them­
selves, do not possess any characteristic essential to 
the concept of inter-State trade etc., but because of 
their nature they normally are an 'essential and integral' 
step in the transportation of goods inter-State, thereby 
forming part of the activity, and thus taking on them­
selves an inter-State character. The High Court 
prefereed to adopt the latter view in declaring prohibi­
tions or restrictions imposed upon such operations
occurring in the course of an inter-State transit of goods as impairing the freedom of inter-State trade etc.\(^1\). However, it could also be said that under the guise of prohibiting or regulating something which was not an inter-State activity, it was an attempt to interfere with an inter-State trade etc. Thus in such cases there appears to be a possibility of having an overlapping between proposition (i) and proposition (iii) enunciated above.

Fergusson v. Stevenson\(^2\) is another example where the reasoning of "inseparable or indispensable concomitant or consequence" of an inter-State transaction was applied. In that case a company which transported kangaroo skins purchased on its behalf in Brisbane to Sydney, was charged with being in possession\(^3\) of any kangaroo skin in New South Wales. The High Court held the law infringed s.92 because: "The transaction in which the defendant's company engaged was essentially one of inter-State trade and the possession which the informant makes the ground of the prosecution was an inseparable concomitant and

\(^1\) R. v. Wilkinson; ex parte Brazell, Garlick and Coy, (1952) 85 C.L.R. 467, at p. 480.

\(^2\) (1951) 84 C.L.R. 421.
consequence of that transaction". But it may also be noted that "possession" itself formed no part of inter-State trade etc., and supplied no element or attribute essential to that conception. Moreover, it was forbidden not in the course of the inter-State journey but at the time of delivery immediately after the journey had come to an end. Under these circumstances it was impossible to imagine how anyone could carry on inter-State trade without being in "possession" of the skins. Thus there were circumstances where it could be said that a prohibition or restriction upon "possession" had consequences upon the importation of skins into New South Wales, and thereby infringing s.92. It is, therefore, submitted that the case is more suitably governed by the "circumstantial means" or "concealed design" principle.

Therefore it is only in certain circumstances that a prohibition or restriction or burden imposed upon an intra-State activity may result in the impairment of the freedom of inter-State trade etc. There must be legal, not economic, connection between an intra-State act prohibited or restricted or burdened and an inter-State activity supposed to be protected so that the former must

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1 Ibid., at p. 435.
have been used, or required or intended to be used, for the purpose of carrying on the latter. In Wragg's Case the plaintiffs sought declarations as to the validity of a law which in effect provided for the fixation of maximum prices in respect of the sale of potatoes in New South Wales, whether imported or not, at every stage of the trade, until they reached the consumer, claiming that it infringed the provisions of s.92. It was held that the plaintiffs were not entitled to any part of the relief claimed.

Then how does Wragg's Case differ from the Vacuum Oil Case or Fish Board v. Paradiso? In all these cases the burden or liability was imposed upon the first sale after importation of the goods. But before s.92 could be invoked, it had to be proved specifically that the goods were imported for purposes of sale and the trader was prohibited or restricted from selling them in his character as an importer. In the Vacuum Oil Case, and Fish Board v. Paradiso, it was proved beyond doubt that such was the case. On the other hand, in Wragg's Case, "the prescription generally of a maximum selling price does not subject any person to a burden or impost or other disability because he is the importer of particular
goods; he is subject to the restrictions in his dealings in
the commodity whether he is an importer or not. Retail
sales were clearly not part of inter-State trade, as the
prescription of a maximum price for them could have only an
economic effect upon the importing business, but there might
be a possibility of the sales by "primary wholesalers" who
were importers, being made in the course of inter-State
trade. Denying such a possibility, Taylor J. said:

It is true that, except in the case of the small
proportion sold by primary wholesalers otherwise
than to secondary wholesalers, the primary
wholesaler does not take the imported potatoes
into store but sells them ex-wharf and delivery
is taken by the purchaser at the wharf, but such
sales are not necessarily part of inter-State
trade. Possibly, upon examination, some may be
found to fall within this category, but this is
not sufficient to entitle the plaintiffs to any
declaration based on the assumption that all or
any one of them constitute a part of trade,
commerce and intercourse between the States even
if, by reason of s.92 such sales are not subject
to the provisions of the legislation - a point
which the views above expressed leave completely
open.2

On several occasions Dixon C.J. put emphasis on the
necessary legal effect rather than ulterior effect
socially or economically.3 It is submitted that in the

1 (1953) 88 C.L.R. 353, at p. 298.
2 Ibid., at p. 399. Also refer to Grannal v. C. Geo Kellaway
Grannal v. Marrickville Margarine Pty Ltd (1955) 93 C.L.R.
55, at pp. 70, 79; R. v. Connare; ex.p. Wawn (1939) 61
C.L.R. 596, at p. 678. See also Hughes and Vale Pty Ltd
v. New South Wales (No.1) (1955) 93 C.L.R. 1 (P.C.), at
p.22.
application of the ‘circuitous means’ or ‘concealed design’ principle this distinction is relevant only in so far as some legal connection must be found between the inter-State transactions and intra-State activities. The relevance or economic consequences was discussed in some detail by Dixon C.J. in Wragg’s Case. In that case the law providing for the fixation of maximum prices was valid because there was no legal connection, as distinct from economic interdependence, between the fixation of maximum prices of goods to be sold in the State and the importation into the State of those goods. Thus there was no necessity of discussing the nature of the restriction or burden imposed upon the sales.

On the other hand if the operation of the law is upon acts, matters or things which in themselves for part of inter-State trade I do not suppose that it matters that it is done by circuitous or devious means. It is a time-honoured principle that you cannot do indirectly what you are forbidden to do directly. It would be strange if the principle did not apply to the effectuation of a constitutional limitation or restriction like s.92. But no such question arises in the present case.

Once some legal connection between inter-State and intra-State activities is established, the courts are not limited to the necessary legal effect of the law in their enquiry into the nature of the restriction or

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burden imposed, but can examine economic or practical considerations. But in order that law may impair the freedom of inter-State trade etc., under the "circuitous means" or "concealed design" principle, the prohibition or restriction or burden must be so severe as to make the carrying on of inter-State trade etc., altogether or practically impossible. In Fish Board v. Paradiso, it was said:

Of course, if the sub-section had provided that all fish in or coming into Queensland, whether in the course of inter-State trade or not, should be delivered to the board for sale there could be no doubt that it would collide with s.92. Indeed we do not understand that proposition to be in dispute. But what difference is there between such a provision and that now under consideration? In each case the plain object is to compel the purchaser to place his property in the disposition of the board; the only difference is in the sanction provided. In the one case a failure to deliver to the board goods in the course of inter-State trade would be punishable by such penalty as might be provided whilst, in the circumstances of the present case, the prohibition against re-selling goods purchased for re-sale serves precisely the same purpose. In the former case, of course, no option is given to the trader; he must, under penalty, comply with the statutory requirement. In the latter case, however, the Acts do not directly and imperatively require fish to be delivered to the board; the trader is free so to deliver it or not as he pleases. But he is told that unless he does he shall not be at liberty to deal with it. The distinction is, however, but a matter of words, and, in truth, s.27(1), as the respondent seeks to construe it, does not give any
practical option to the trader. In the second Hughes and Vale Case, Dixon C.J., McTiernan and Webb JJ., gave examples of the imposition of a restriction or burden on incidents or accidents of inter-State transportation so as to impair the freedom of inter-State trade etc., e.g., a regulation of the hours during which certain goods might be carried from one State to another by fixing timings or periods so as to make the purpose of the journey practically impossible, or prescribing absurdly low limits for an axle load or wheel load so that no heavy lifts would be permissible.

The words 'altogether' or 'practically' do suggest that even if the operation of an inter-State activity is legally free but rendered economically impossible, it would constitute an infringement of s.92. "It is in each case a question of ascertaining the actual effect of the legislation or the executive act on the inter-State trade of the person or persons complaining of it. A total prohibition of the trade itself need not be found; as Fullagar J. pointed out in McCarter v. Brodie a

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1 (1956) 95 C.L.R. 443, at pp. 452, 453. (Italics supplied). S. 27 (1) of the Fish Supply Management Acts 1935 to 1951 (Q.), provides: "No person shall in any district sell or purchase any fish unless such fish have first been brought to a market in that district and there sold at a sale conducted by the board ...".

2 (1955) 93 C.L.R. 127, at p. 163.

3 (1950) 80 C.L.R. 432, at p. 496.
restriction making the trade economically impossible to maintain could in some cases suffice. When Dixon J. said that the Privy Council had rejected the test of ulterior social or economic effect, he was by no means denying that an enactment according to the necessary effect of its language might purport to impose a burden in the economic sense, which burden s.92 would invalidate because of its very economic effect. The section does not operate merely to enable a trader to disregard fines or imprisonment; if it were so limited, expropriations and seizures of goods would be outside its operation and might speedily circumvent it. Thus in the Egg Pulp Case it was held that the law prohibiting the production of egg pulp from "cracks" operated directly and immediately to render economically purposeless the defendant's importation of "cracks".

The use of expropriation is an obvious case of stopping inter-State trade or preventing it altogether. Of course it would not be so if the commodity is not

committed to inter-State trade by some overt act.  

There seems to be some difficulty in fitting the Vacuum Oil Case within the notion of "altogether" or "practically" impossible. In that case the factor which mainly influenced the High Court to invalidate the law in question was the promotion of sale of locally produced power alcohol at the expense of petrol imported from outside the State. "But, for the advantage of another commodity which is produced within the State, a commodity contributing to the same purpose", Dixon J. said, "it burdens an imported commodity in the hands of the importer". It may be doubted whether the burden made inter-State trade "altogether" or "practically" impossible. However, it is a matter of opinion and individual assessment of the circumstances in each case.

The Vacuum Oil Case indicated that the object or purpose of an activity by reference to which burden was

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1 See Wilcox Mofflin v. New South Wales (1952) 85 C.L.R. 488.
2 (1934) 51 C.L.R. 108, at p. 128.
3 See James v. Commonwealth (1936) 55 C.L.R. 1 (P.C.), at p. 59; their Lordships said: "In every case it must be a question of fact, whether there is an interference with this freedom of passage."
imposed might be relevant in ascertaining the severity of the burden. If an inter-State activity is carried on for a certain purpose and that very purpose is frustrated by the operation of a law, it would amount to an interference with inter-State trade etc. In Wragg's Case, Taylor J. said: "The conclusion might well be different if it were established in any particular case that a Prices Regulation Order relating to intra-State sales had been promulgated for the purpose of preventing or impeding or otherwise burdening the business of operating such goods into New South Wales from another State"¹.

One way of frustrating the purpose of an inter-State activity is to impose so severe a restriction or burden on an inter-State act as to make that purpose economically purposeless or practically impossible, e.g., the Egg Pulp Case or Fish Board v. Paradiso. The other is by creating certain conditions such as in the Vacuum Oil Case; there were two commodities contributing to the same purpose, but the purpose of imposing the condition of buying a certain quantity of power alcohol was to support home production of power alcohol. The same

¹ (1953) 88 C.L.R. 353, at p. 399.
result could also be achieved through economic sanctions, say by imposing a tax on the goods in importers’ hands as in the Commonwealth Oil Refineries Case. Thus purpose is an important factor in determining the nature of the restriction or burden imposed and if it is frustrated, whatever the reasons may be, it is an impairment of the freedom of inter-State trade etc.

III

It has been recognised that a law discriminating against inter-State trade and commerce as compared with intra-State was invalid as interfering with the freedom of inter-State trade and commerce. Even though such a law did not impose a restriction or burden upon an inter-State activity and proceed by reference to or in consequence of some feature essential to the concept of inter-

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State trade and commerce, it does have a consequence directly upon the inter-State movement of something so as to prevent the operation of inter-State trade or commerce altogether. It would, therefore, under the guise of dealing with something else, amount to an attempt to impair the freedom assured by s.92. In Fox v. Robbins it was held that a Western Australian law requiring payment of a higher license fee for selling wine manufactured from fruit grown in another State than for selling wine manufactured from fruit grown locally, was invalid as being inconsistent with s.92. The activity involved was the sale of wine, an intra-State transaction, but the imposition of a restriction or burden upon the sale of wine along with discrimination by way of requiring different license fees for two kinds of wine had as an indirect economic consequence a discouragement to the importation of wine from other States which was the essence of inter-State trade etc. "This provision (s.92)"; said Griffith C.J., "would be quite illusory if a State could impose disabilities upon the sale of products of other States which are not imposed upon the

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(1909) 8 C.L.R. 115.
sale of home products"\textsuperscript{1}.

IV

Another circuitous way of impairing the freedom assured by s.92 was recognised by the High Court when under the guise of removing all the legal remedies, a State might validate its own legislative acts which were beyond its competence or validate administrative acts done in pursuance of such invalid legislation. Such an attempt was made by the New South Wales government to protect itself against claims arising from the invalidation of the relevant Acts (in respect of their execution, such as seizure of motor vehicles and exaction of license fees) in the First Hughes and Vale Case; the State Transport Co-ordination (Barring of Claims and Remedies) Act 1954 purported to bar any action, suit, claim or demand against the State in respect to any of the matters referred to in those invalidated Acts. In Antill Ranger & Co. Pty Ltd v. Commissioner for Motor Transport\textsuperscript{2}, this

\textsuperscript{1}Ibid., at pp. 119, 120. Note that on a different (historically possible) interpretation of s.92, it is aimed specifically at discriminatory laws. It is only on the present very artificial construction of s.92 that legislation like that held invalid in Fox v. Robbins, supra, must be brought within the "circuitous means" doctrine.

\textsuperscript{2}(1955) 93 C.L.R. 83. Also refer to Deakin v. Grimshaw (1955) 93 C.L.R. 104.
Act was held invalid as being inconsistent with s.92.
The barring of the remedy did not itself render the act, i.e., seizure of motor vehicle or exaction of license fees, lawful, but the provisions of the Act (barring the remedy) assumed the validity of those Acts which the State legislature had no authority to authorise under the Constitution. It was de facto legalising the exaction of the license fee and leaving the inter-State trader "with no means of reparation and in exactly the same condition as he would occupy had there been an antecedent valid legal authority for the exaction". Dixon C.J., McTiernan, Williams, Webb, Kitto and Taylor JJ., in their joint opinion said:

It seems implicit in the declaration of freedom of inter-State trade that the protection shall endure, that is to say, that if a governmental interference could not possess the justification of the anterior authority of the law because it invaded the freedom guaranteed, then it could not, as such, be given a complete ex post facto justification.

Ibid., at p.101. In a similar case, Deakin v. Grimshaw, supra, at p.108, Fullagar J., referring to the argument of the defendant that the Act of 1954 had no relation to inter-State commerce and could not be said to restrict, impede or burden any activity possessing the character of inter-State commerce, said: "But it is none the less, in my opinion, inconsistent with s.92. For its direct effect is seen, when the position is analysed, to be to deprive persons, who were in the past engaged in inter-State commerce, of the protection of s.92, which they would otherwise be entitled to invoke for their inter-State commercial activities."
A similar question was involved in Barton v. Commissioner for Motor Transport. This time the defendant, Commissioner for Motor Transport, relied upon a later Act, the Transport (Division of Functions) Act 1932-1956 (N.S.W.), the outcome of which was to fix a time limit of one year for bringing an action on a claim for the recovery of moneys collected by the Commissioner under any Act conferring the relevant powers upon him. These provisions in effect barred the remedy in a case in which one year had elapsed from the time money was paid or collected in pursuance of a law declared invalid subsequently. It could be noticed that at the time of enacting the law, it was assumed that the moneys were paid or collected under some Act which was declared invalid subsequently and that the moneys would be recoverable under the existing law. Thus it was an attempt distinguishable only in form from that of the State Transport Co-ordination (Barring of Claims and Remedies) Act 1954 and in substance being the same. Dixon C.J. said: "It attempts to bar absolutely the legal remedy to recover money already exacted in violation of the freedom assured by s.92."  

2 Ibid., at p.726; Fullagar J. dissented from the majority and based his opinion on the observation made in Antill Ranger & Co. Pty Ltd v. Commissioner for Motor Transport, supra, at p.103. There he thought that if the Act did no more than limit the remedy, while leaving practically effective redress open to the plaintiff, it would not be inconsistent with s.92.
The doctrine of 'essence' and 'accidents' as enunciated by Dixon C.J., along with the application of the 'circuitous means' and 'concealed design' principle, as applied in testing the constitutionality of an enactment, has become a major obstacle in the implementation of various government programmes and policies, particularly in the field of social and economic activities involving movement of something inter-State, e.g., nationalisation of air transport¹ and the business of banking², the control of road transport³, schemes of organised marketing⁴, but "there are still important areas of the doctrine which leave considerable scope for individual judgment and therefore for further systematic refinement and pragmatic adjustment, notably in the concept of 'real prejudice or impairment' to inter-State transactions, in the identification of particular features of a transaction which a law

¹ Australian National Airways v. Commonwealth (1946) 71 C.L.R. 29 (the Airlines Case).
² Bank of New South Wales v. Commonwealth (1948) 76 C.L.R. 1 (H.C.); (1949) 79 C.L.R. 497 (P.C.).
⁴ James v. South Australia (1927) 40 C.L.R. 1; James v. Cowan (1932) 47 C.L.R. 386 (P.C.); James v. Commonwealth (1936) 55 C.L.R. 1 (P.C.); Peanut Board v. Rockhampton Harbour Board (1933) 48 C.L.R. 266.
selects as the basis of its operation and in the concept of a 'device' or 'circuitous means' of impeding inter-State transactions.\(^1\) Some of the obstacles to the performance of economic functions may perhaps be surmounted through the use of extra-legal methods such as making compliance with government policy more attractive or seeking co-operation between public and private interests.\(^2\) Constitutionally or legally there does not seem much hope of overcoming these obstacles at the moment.\(^3\)

In the Bank Nationalization Case,\(^4\) Lord Porter, after laying down the distinction between regulatory and prohibitory laws so that the latter would be an impairment of the freedom of inter-State trade etc., made a reservation:

\(^1\) See Anderson, Essence, Incidence and Device under Section 92 of the Constitution, (1959-60) 33 Aust. L.J., 294, at p. 306.


\(^3\) Several writers have suggested the amendment of s.92: Garran, Prosper the Commonwealth (1958) at p. 212; following the hint in James v. Commonwealth (1936) 55 C.L.R. 1 (P.C.), at p. 61, an attempt was made to amend it but was not approved by the electorate: Knowles, The Australian Constitution (1936) at p. 272B. One writer even suggested it be repealed altogether: Holman, "S.92 - Should it be Retained" (1933) 7 Aust. L.J. 140.

For their Lordships do not intend to lay it down that in no circumstances could the exclusion of competition so as to create a monopoly either in a State or Commonwealth agency or in some other body be justified. Every case must be judged on its own facts and in its own setting of time and circumstance, and it may be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation and that inter-State trade commerce and intercourse thus prohibited and thus monopolised remained absolutely free.

In the absence of any further explanation appended to this passage, it is rather difficult to estimate its potentialities. One possible explanation may be that whenever a doctrine or test is propounded it is thought desirable to soften down its rigours by making some kind of general reservation in anticipation of a situation justified in certain circumstances as the "only practical and reasonable" solution. At the same time, it is suggested that following Dixon C.J.'s approach to s.92 as enunciated in the Second Hughes and Vale Case and the Lotteries Case, the only situation in which nationalisation of banks could be imagined as valid (and perhaps could have been justified in 1950) in the face of s.92,


2Mansell v. Beck (1956) 95 C.L.R. 550; see also Hospital Provident Fund Pty Ltd v. Victoria (1952) 87 C.L.R. 1.
is at a time of grave economic crisis in a Commonwealth, and it appears to be the "only practical and reasonable" solution. The law would be supposed to proceed by reference to or in consequence of the 'control of economy' as being the essential character of the business of banking which itself forms no part of inter-State trade etc., and supplies no element or attribute essential to that occupation.

Suppose that instead of prohibiting the business of banking straightaway, the same result is sought to be achieved by prohibiting the deposit of money by customers with private banks providing an exception for deposits carried out across the border of a State. Deposit of money itself is not inter-State trade etc., and its prohibition prima facie would not constitute an infringement of s.92. Can the 'circuitous means' or 'concealed design' principle be extended to such a case where an activity, i.e., banking including interstate banking, is prohibited under the guise of prohibiting 'depositing' - a prohibition which could not be achieved directly by

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1 See Sawer, Some Legal Assumptions of Constitutional Change, (1957) IV Uni. of W.A. Annual L. Rev. 1, at p.17; Australian Constitutional Cases (2nd ed.) at p.327(n).
prohibiting the business in private banks? Now the business of banking consists in the "creation and transfer of credit, the making of loans, the purchase and disposal of investments and other kindred activities" and is a part of inter-State trade etc., "in so far as it is carried on by means of inter-State transactions". But in order to create credit or make loans etc., it is necessary to raise funds through customers asking them to deposit money with the banks. Thus there are circumstances in which the "circuitous means" or "concealed design" principle could be applied. If the prohibition or restriction imposed on "deposit of money" is so severe as to leave no funds available for transacting the business of banking and thus making it altogether or practically impossible to carry on that business, it is submitted, it would be an impairment of the freedom of inter-State trade etc. Perhaps it would be a different matter if the business is conducted only within the borders of a State.

Similar problems may arise where the use of acquisition is made in depriving private companies of all their aircraft with the purpose of creating government monopoly in air traffic. Suppose in the Airlines Case the

2 See Sawyer, op. cit., at p. 16.
Commonwealth had legislated to acquire aircraft owned by private companies, individually by name, on just terms, for the purpose of inter-State air transportation of passengers and goods. Here acquisition of something strikes at its ownership, which in itself is not inter-State trade etc., and therefore does not ordinarily impair the freedom assured by s.92. But aircraft is a property of which there could be only one use and that is transportation of passengers and goods, and its acquisition in effect amounts to deprivation of its use. There is too the additional factor that the private company could truly say that it required the aircraft for inter-State operation. Therefore it could, in the circumstances, be said to be an impairment of the freedom of inter-State trade etc., under the guise of acquiring an aircraft as an object of ownership.

As there are not very many cases where the 'circuittous means' or 'concealed design' principle has been applied, it could be said that the implications in the application of the principle are not yet fully realised.

1 Similar reasoning was followed in Hughes and Vale Pty Ltd v. New South Wales (No.2) (1955) 93 C.L.R. 127, at p. 182.
But the case law available and the judicial dicta quoted above suggest its importance as a component of Dixon C.J.'s test of 'essence' and 'accident'. Had the test been confined only to the propositions (i) and (ii) mentioned above, many loopholes would have been left, whereas given (iii), we have an extraordinarily flexible judicial device for striking down legislation obnoxious to the judicial goal of "controlled laissez-faire" in interstate trade.
At the time of the making of the Constitution there was a genuine fear that the Federal Government might exercise its powers by making laws which pressed more heavily on people or their property in some States than on people or their property in other States and so hinder the progress of the Commonwealth. Thus in order to maintain equality among the States and particularly to prevent favouritism and partiality in commercial and kindred regulations, certain safeguards, i.e., s.51(ii)\(^1\), s.51(iii)\(^2\), s.88\(^3\) and s.99\(^4\) were provided in the Constitution, operating as prohibitions on the law-making

1 It provides: "Taxation; but so as not to discriminate between States or parts of States".

2 It provides: "Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth".

3 It provides: "Uniform duties of customs shall be imposed within two years after the establishment of the Commonwealth".

4 It provides: "The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue give preference to one State or part thereof over another State or any part thereof".
powers of the Commonwealth Parliament from giving preference to a State or part thereof over another State or part thereof, and creating discrimination or lack of uniformity between States or parts thereof. Obviously the States were not and could not become "equal" in any material sense; the point of prohibitions was to prevent Commonwealth action from exacerbating inequalities, or, putting it another way, to preserve formal equality in the operation of federal law. (S.96, per contra, enables the Commonwealth to reduce material inequalities - or to add to them, if it thinks fit). The idea of ss.51(ii) and (iii), 88 and 99 restrain the Commonwealth Parliament from giving preference or creating discrimination - a negative function. But having regard to the number and potentially broad scope of these prohibitions, and remembering the central place which "circuitous" evasion of a prohibition has come to occupy in relation to s.92, one might reasonably have expected the Courts likewise to be astute in recognising evasions of the spirit or substantial purpose of these sections. In fact this has not happened, because interpretations established by Judges not much given to looking for evasions have remained

1 See Quick and Garran, The Annotated Constitution of the Australian Commonwealth (1901) at pp. 550, 877.
dominant; occasional dissents from differently minded Judges, including Sir Owen Dixon, indicate the lines along which this part of the law might have developed.

II

Discrimination and lack of uniformity appear to be synonymous and in effect carry the same meaning; and a law creating discrimination between two States also creates lack of uniformity between them and vice versa.

But preference has a narrower scope in operation than discrimination or lack of uniformity. Mere differentiation between two situations involving persons, things or places would only create discrimination or lack of uniformity, but in order to constitute preference the differentiation should further be so designed as to produce some tangible advantage. Thus preference necessarily involves discrimination or lack of uniformity, but not vice versa. For example, in Crowe v. Commonwealth, a Commonwealth law providing for the constitution of the Dried Fruits Control Board, inter alia, consisting of (among others) two representatives to

1 See Elliott v. Commonwealth and Another (1935) 54 C.L.R. 657, at pp. 668, 683.
2 (1935) 54 C.L.R. 69.
be elected by the growers in each of the States of New South Wales, Victoria, South Australia and Western Australia (the States of Tasmania and Queensland having no representation), was held as not constituting preference because in selecting the members of the Board no tangible or material advantage was given to trade and commerce of one State over another, even though it did discriminate between the States\(^1\). On the other hand, in *James v. Commonwealth*\(^2\), a regulation made under the Dried Fruits Act, 1928, the effect of which was to prevent the transport of dried fruits if held only in

\(^1\) The views expressed by the members of the High Court were summarised by Latham C.J. in *Elliott v. Commonwealth and Another* (supra) at p.669: "In the case Rich J. said that s.99 referred to 'tangible advantage of a commercial character' (at p.83). Starke J. said: 'The preferences prohibited by s.99 are advantages or impediments in connection with commercial dealings' (at p.86). Similarly Dixon J. said: 'The preference referred to by s.99 is evidently some tangible advantage obtainable in the course of trading or commercial operations, or, at least, some material or sensible benefit of a commercial or trading character' (at p.92). Evatt and McTiernan JJ. pointed out that the provision which was then challenged 'neither puts any State in possession of trading advantages over another State nor gives it the power to obtain any such advantages' (at pp. 96, 97) 'and for that reason it was not obnoxious to s.99 of the Constitution.'"

\(^2\) (1928) 41 C.L.R. 442. It may be noted that in this case the preference was purely in the drafting of the legislation; there was no preference in economic fact.
Queensland or Tasmania, was held to constitute preference prohibited by s.99.

There seems to be an overlapping between s.99 and s.51(ii), as the word 'revenue' occurring in s.99 includes 'taxation'. A preference in relation to 'taxation' infringing s.99 would as well create discrimination infringing s.51(ii). At the same time, a discrimination in relation to 'taxation' would also confer a tangible advantage in respect of those who are favourably situated, and, therefore, necessarily involve preference which infringes s.99. Further, as the subject matter of revenue is practically exhausted by taxation, the prohibition of preference provided in s.99 is virtually confined in its operation to laws of trade and commerce not falling within the scope of s.51(ii), s.51(iii) or s.88.

The meaning of the word 'preference' was discussed in detail in Elliott v. Commonwealth and Another. In that case a law providing for a system for licensing seamen was prohibited by s.99.

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2 Except few matters such as fees for use of air fields, shipping services, post-office etc.
3 (1935) 54 C.L.R. 657 (Elliott's Case).
applicable only at ports in the Commonwealth specified in the regulations made thereunder; the regulations specified only, inter alia, six ports in four States, excluding Tasmania and Western Australia. This was held by the High Court, Dixon and Evatt JJ. dissenting, as not constituting preference within the meaning of s.99.

All the members of the Court were agreed that in order to constitute preference there must be some tangible advantage obtainable in the course of trading or commercial operation, but differed as to the nature of the advantage. Latham C.J., with whom McTiernan J. substantially agreed, said that the prohibited preference must amount to an advantage definitely given to one State or part thereof over another State or part thereof, and that it was more a question of opinion rather than to be settled upon legal grounds. He, therefore, concluded that because of the vagueness as to the nature of preference and its recipients, it was difficult to ascertain satisfactorily what the alleged preference was and what State or part thereof received it. On the other hand, Dixon J. dissenting, argued that because of the use of the phrase "give preference", and not "give a preference", 1

1 Ibid., at pp. 669, 670.
what was forbidden was some material or sensible benefit of a commercial or trading character generally, and thus the Court was not required to estimate the total amount of economic or commercial advantage resulting from the operation of the law.

The basic difficulty lies in the fact that the expression "State or part thereof" has been supposed to denote a geographical unit. A State can, therefore, be identified as a geographic area having a certain number of persons involved in different occupations. In such a case it would not be difficult to recognise discrimination, but in assessing a tangible advantage so as to constitute preference, different considerations crop up making the problem more complex.

In James v. Commonwealth, a State or a locality was identified with persons and their property. "Discrimination between localities means", Knox C.J. and Powers J. explained, "that because one man or his property is in one locality, then, regardless of any other circumstance, \[ I_{bid.}, \text{at pp. 683, 684.} \]


\[ (1928) 41 \text{C.L.R. 442.} \]
he or it is to be treated differently from the man or similar property in another locality"¹. This proposition looks simple at its face but creates practical difficulties in its application. What persons are to be selected for identification? Suppose a law purports to operate upon a certain class of persons, does it mean that it also includes within its operation (for purposes of ascertaining preference) persons other than those mentioned? In a society there is always an interaction of various social and economic forces and an impact of one class of persons upon another. Then, to put it as a broad proposition, does it include social and economic or trading consequences ensuing ultimately from its operation at a particular place and at a particular time? If it is so, then it could be argued that as the States of Queensland and Tasmania did not produce any fruits, such a discrimination did not make any real difference to them. But Higgins J. replied that no judicial notice could be taken of such facts².

Dixon J. tried to approach the problem on a broader basis. He said that the preference might consist in a

¹Ibid., at pp. 455, 456.
²Ibid., at p. 461.
greater tendency to promote trade, in furnishing some incentive or facility, or in relieving from some burden or impediment. This view seems to include more considerations than the persons and their property within a State or a locality. But he issued a caution that the Court was not concerned with the trading or economic consequences of a law. It may be noted that in spite of the fact that his approach is not as clear as that of Knox C.J., and Powers J., in James v. Commonwealth, it is more realistic and leaves some scope for other factors for consideration, e.g., particular evil or inconveniences found at one place and not at another.

It may be noticed that the expression "give preference" is as vague and imprecise in its operation as the expression "absolutely free" occurring in s.92. But, curiously enough, in contrast to s.92, the majority of the High Court in Elliott's Case, particularly Latham C.J., by giving a narrow interpretation to 'preference' has considerably reduced the importance of s.99.

Dixon J.'s approach to s.99, however, appears to be

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2. (1928) 41 C.L.R. 442.
in conformity with the current interpretation of s.92 in establishing "a standard of validity which is concerned with the character of the law or regulation of commerce and not with the particular trading or economic consequences which may or may not in fact ensue from it at a particular place and time". It has been repeatedly said that in ascertaining the validity of a law on grounds of s.92, the court was not concerned with the social or economic consequences arising due to the imposition of a burden or restriction upon a certain activity. "The economic consequences which it may have upon inter-State trade may well be serious, but that is a different thing from interference by law or government action with the freedom which s.92 confers." Similarly, if a law gives preference to something which has its economic consequences upon trade and commerce, there would not be any violation of the constitutional prohibition provided in s.99.

1 Ibid., at p. 684.
Another difficult problem of interpretation has arisen due to the use of the expression "between States or parts of States" and "one State or any part thereof over another State or any part thereof" in s.51(ii) and s.99 respectively. Reference has been made to both these expressions simultaneously as they were supposed to be identical in purport and effect and convey the same idea\(^1\), and, therefore, similar considerations apply to both of them. However, an apparent distinction between the two could be noticed in that the former expression, in addition to the discrimination between States or parts of different States, also includes discrimination between parts of the same State, but in practice "it would be difficult if not impossible to devise such a preference which would not also involve a preference to part of a State over another State or over a part of another State\(^2\).

There had been two views about the interpretation of these expressions and the matter is not yet authoritatively

\(^1\) R. v. Barger (1908) 6 C.L.R. 41, at p. 107; James v. Commonwealth (1929) 41 C.L.R. 442, at p. 455; Elliott v. Commonwealth and Another, supra, at pp. 672, 673.

\(^2\) Elliott v. Commonwealth and Another, supra, at p. 667 per Latham C.J.; also refer to Evatt J. at p. 690.
settled. One view was propounded by the majority consisting of Griffith C.J., Barton and O'Connor JJ., in R. v. Barger\textsuperscript{1}, that the words "States or parts of States" must be read as synonymous with "parts of the Commonwealth"\textsuperscript{2}. The other view was propounded by Isaacs J. in the same case. He said: "The treatment that is forbidden, discrimination or preference, is in relation to localities considered as parts of States, and not as mere Australian localities, or parts of the Commonwealth considered as a single country."\textsuperscript{3}

Isaacs J.'s reasoning was referred to with approval in Cameron v. Deputy Federal Commissioner of Taxation\textsuperscript{4}. In that case a regulation directed that for the purpose of determining the income of graziers, the values of livestock at the beginning and end of the year had to be brought into account at stated figures which varied according to the States in which the stock was situated. The only discernment adopted was the State in which the stock was situated and there could hardly be any

\textsuperscript{1} (1908) 6 C.L.R. 41.
\textsuperscript{2} Ibid., at p. 78.
\textsuperscript{3} Ibid., at p. 107. (Italics supplied).
\textsuperscript{4} (1923) 32 C.L.R. 68; see also James v. Commonwealth (1928) 41 C.L.R. 442, at pp. 455 and 456.
difference of opinion in the outcome of the decision. There was no question of discrimination between "parts of States". Still Isaacs J.'s definition of "States or parts of States" was cited with approval\(^1\). Yet it could also be said that the other view was not disapproved or negatived, and the same result could have been reached by reference to the reasoning of the majority in Barger's Case, as there was no conflict between the two views as to the general understanding of discrimination between States.

The matter came up for discussion again in Elliott's Case. Latham C.J., though considering it not necessary for the decision (so his opinion may be considered as an *obiter dicta*), preferred Isaacs J.'s reasoning and referred to its earlier approval in Cameron's Case. He thus concluded that the application of the regulations depended upon the selection of ports as ports and not of States or parts of States as such, as a State could not be identified with its capital city or its principal port or ports, and so there was no discrimination forbidden by s.51(ii) or s.99\(^2\). McTiernan J. was also of the same opinion.\(^1\)\(^2\)

\(^1\) *Ibid.*, at p.72; also refer to *Isaacs J.* at p.76, *Higgins J.* at pp. 78, 79, and *Rich J.* at p. 79.

\(^2\) (1935) 54 C.L.R. 657, at p. 674.
opinion that the ports had been specified without any regard to the fact whether any such port was in State "A" or State "B". Starke J. did not express any opinion on this issue. It is rather doubtful about Rich J.'s opinion, but from what he said in Cameron's Case, it could be inferred that he impliedly favoured Isaacs J.'s reasoning. Dixon J. did not think it necessary to explain "part of a State", as the case, in his opinion, did not depend upon this issue. But the other view was fully supported and further explained by Evatt J. who saw in the licensing system giving a tangible advantage and furnishing an incentive or facility solely by reference to the locality of the place of engagement as a result of a deliberate selection only of six ports in four States. In such a state of affairs it could hardly be said that Isaacs J.'s reasoning received an express approval of the High Court.

1 Ibid., at p. 704.
2 (1923) 32 C.L.R. 68, at p. 79.
4 Perhaps the better opinion is that the majority view in R. v. Barger (1908) 6 C.L.R. 41, is still good law.
If Latham C.J.'s reasoning based upon the thesis propounded by Isaacs J. is accepted, then the scope of avoiding the prohibition is enlarged by giving preferences or creating discriminations on the basis of electoral divisions or municipal areas or such other demarcations, and the whole purpose of providing such prohibitions could be frustrated. In reply, Latham C.J. argued that the opposite view was also open to substantially the same objection. But that is true in every case without caring for what interpretation is given to a particular prohibitions. The question is which interpretation carries further the purpose and fulfils substantially the role to be played by the prohibition in the wider context. Certainly Latham C.J.'s reasoning, as compared to the other view, makes the protection of s.99 and s.51(ii) largely illusory.

Dixon J. in his dissent said that in specifying the chief ports in each of the four States a course was taken which must be considered as affecting each of those States as a whole and in doing so, those States were preferred over others. This conclusion was based upon the fact that for the most part, that trade was done from

\[\text{Elliott v. Commonwealth and Another (1935) 54 C.L.R. 657, at p. 675.}\]
the ports prescribed in each of the four States mentioned, e.g., in New South Wales from Sydney and Newcastle. Such reasoning is based largely on questions of fact. So it is not surprising if Latham C.J. reached the opposite conclusion. For example, in New South Wales, he observed that some trade to and from southern New South Wales passed through Melbourne, and that some trade from northern New South Wales passed through Brisbane and, therefore, the State of New South Wales could not be identified with Sydney or Newcastle. This approach leads to another difficult question as to the desirability of the evidence to be considered in such an inquiry.

IV

As mentioned earlier, the word 'revenue' in s.99 has become insignificant because of the overlapping between s.51(11) and s.99, and the prohibition of preference is virtually confined to laws or regulations of trade and commerce. But does it mean that the operation of s.99 is limited to laws or regulations authorised only by s.51(1), or applies to other laws or regulations which

1 Ibid., at p.682. This observation may not be confused with what he said about 'preference'. Associating the ports as affecting each of the States as a whole is a different issue altogether.
can be supported under other legislative powers having an effect upon or in relation to trade and commerce? In Morgan v. Commonwealth\(^1\), it was decided that the section should be read as applying to laws which could be made only under the power conferred by s.51(i). Certain regulations made under the National Security Act were challenged on the ground that they infringed the prohibition contained in s.99. As the regulations were made under the defence power, i.e., s.51(vi) and could not be justified under s.51(i) as trade and commerce legislation, it was contended by the defendants that s.99 had no application to laws made under the defence power or any power other than contained in s.51(i). The High Court accepted the contention and held in favour of the defendants.

It was argued that the circumstance that the Commonwealth Parliament had no power to make laws with respect to trade and commerce between parts of the same State and also that the prohibition of preference did not purport to deal with preferences between parts of the same State, shows a connection between s.51(i) and s.99;\(^1\)

\(1\) (1947) 74 C.L.R. 421.
and that such a connection was absent between s.99 and other powers referred to in s.51 under which laws might be passed affecting trade and commerce not only inter-State, but also intra-State. Their Honours, Latham C.J., Dixon, McTiernan and Williams JJ., explained that "if s.99 were construed as applying to all laws affecting trade and commerce passed under any of the powers contained in s.51, including the defence power, there would be an unexplained gap as to intra-State preferences".\(^1\) Such an argument is equally applicable to the prohibition contained in s.92, or perhaps with greater force, as the words "among the States" which are absent in s.99, occur in both s.92 and s.51(i)\(^2\). Yet the "unexplained gap" as to intra-State trade and commerce was never thought of in the case of s.92.

Further their Honours thought it remarkable to extend the operation of s.99 to s.51(vi) "at a time possibly of the most critical threat to national existence".\(^3\)

\(^1\) *Ibid.*, at p. 453.

\(^2\) The word "intercourse" occurring in s.92 may be an obstacle in such a reasoning, but, as Dixon C.J. explained in *Australian National Airways v. Commonwealth* (1945) 71 C.L.R. 29, at p. 83, it is of no significance; it may be overlooked in understanding broader issues.

\(^3\) (1947) 74 C.L.R. 421, at p. 453.
but no such danger or threat was envisaged in the application of s.92. It is hard to explain this distinction, leaving aside the question of the desirability of such considerations, in spite of the fact that in both cases the approach is that of formal construction of the words or expressions provided therein.

If s.99 applies only to laws made with respect to the subject matter contained in s.51(1), trade and commerce with other countries and among the States, it becomes necessary, before s.99 could be applied, to determine whether the law is such a law. Moreover the words "with respect to" include the authority to make laws which are also incidental or ancillary to the subject-matter, and therefore the scope of the prohibition contained in s.99 is extended to all matters that are incidental or ancillary to trade and commerce with other countries and among the States. In contrast, such an idea has been rejected as fallacious in the case of s.92, whose operation is confined to an 'essential' of inter-State trade, commerce and intercourse. Thus what matters in the

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1 See Gratwick v. Johnson (1945) 70 C.L.R. 1.
3 See e.g., Grannal v. Marrickville Margarine Pty Ltd, supra.
application of s.99 is the 'substance' of the legislation\(^1\), while in the case of s.92, it is the 'essence' of inter-State activity to which the legislation applies\(^2\). For example, a law prohibits the manufacture or production of a commodity. Its 'substance' falls within the legislative power conferred by s.51(1), and therefore, it is within the scope of the prohibition provided in s.99. On the other hand, it would escape the prohibition of s.92 unless it is 'circuitous means' or 'concealed design' legislation, because it operates by reference to or in consequence of something not forming part of trade, commerce and intercourse among the States, and having no element or attribute essential to that conception.

Further our maxim finds its application in both cases, s.99 and s.92. But if a law, under the guise of preferring something which is not trade and commerce, gives preference to what is prohibited by s.99, it is the rule in Barger's Case that would operate. On the other hand, if a law impairs the freedom of inter-State trade, commerce and intercourse by 'circuitous means' or

\(^1\) Morgan v. Commonwealth (1947) 74 C.L.R. 421, at p. 453.

"concealed design", there must be certain circumstances to show a connection between the activity, intra-State or an incident of inter-State activity, restricted or burdened by the law and the inter-State activity sought to be protected by s.92. It further depends upon the nature of the restriction or burden imposed. Yet purpose is relevant in both the cases, though in case of s.92 in a much restricted sense.

1 See Wragg v. New South Wales (1953) 88 C.L.R. 353.

2 See e.g., Fish Board v. Paradiso (1956) 95 C.L.R. 443.
CHAPTER X

Section 116 of the Australian Constitution

S. 116 is provided in the form of a *fundamental right* guaranteed to a citizen, and operates as a prohibition on the Commonwealth and not on any State. It is concerned in general with the policy of religious toleration and non-intervention in religious affairs, and restrains the Commonwealth from establishing any religion, or imposing any religious observance, or prohibiting the free exercise of any religion, or requiring the religious test as a qualification for any office or public trust.

Although the Commonwealth has no express power under the Constitution to make laws with respect to the subject

1 The section runs thus: "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

For general discussion of s. 116, refer to Cumbrae-Stewart, Section 116 of the Constitution, 20 Aust. L.J. (1946) 207; Wynes, Legislative, Executive and Judicial Powers in Australia, (2nd ed.), at pp. 176-182.
of religion, it was thought necessary to prevent such an implication arising out of the recognition of Almighty God in the Preamble by specifically providing s.116\(^1\).

"Accordingly no law can escape the application of s.116 simply because it is a law which can be justified under ss.51 or 52, or under some other legislative power. All the legislative powers of the Commonwealth are subject to the condition which s.116 imposes"\(^2\).

In order to determine whether there has been a violation of the religious freedom, Latham C.J., in the Jehovah's Witnesses Case\(^3\) observed that the purpose of the legislation might properly be taken into account. That case involved the constitutional validity of the National Security (Subversive Associations) Regulations and an Order in Council made thereunder, declaring that the existence, inter alia, of the organisation known as Jehovah's Witnesses was prejudicial to the defence of the Commonwealth and the efficient prosecution of the war.

\(^1\) Quick and Garran, The Annotated Constitution of the Australian Commonwealth, (1901) at p. 951.


\(^3\) (1943) 67 C.L.R. 116, at p. 132.
The Association of Jehovah's Witnesses was a religious sect professing primitive Christian beliefs and preaching to overthrow all the satanic governments including the British Commonwealth of Nations, but not engaging in overt hostile acts. One of the contentions put forward by the plaintiff Association was that the Regulations infringed s.116. But the High Court did not accept that contention.

Referring to the history of mankind and different ideologies propounded by various religions, Latham C.J. emphasised the fact that the religious belief and practice could not absolutely be separated either from politics or from ethics and there might appear inconsistency between political purposes and religious principles. However, if a law provides a measure necessary to preserve the very existence of the State, say during wartime, it would not be unconstitutional as interfering with the individual religious freedom, because the very existence of a State presupposes an ordered society and "assumes that citizens of all religions can be good citizens" otherwise the protection of liberty as a social right within a State at the cost of the existence of that State would be meaningless and
ineffective. In the same vein, Williams J. explained:

If the Regulations only conferred such powers as were reasonably required to prevent bodies disseminating principles and doctrines prejudicial to the defence of the Commonwealth during the war, they could not be impeached under s.116, even if they interfered incidentally with activities that some persons in the community considered to be the free exercise of religion, because in its popular sense such principles and doctrines would not be considered to be religion, but subversive activities carried on under the cloak of religion.

For the same reason in Krygger v. Williams, it was held that a person who was forbidden by the doctrines of his religion to bear arms was not thereby exempted or excused from undergoing the military training and rendering the personal service required by the provisions of the Defence Act 1903-1910. "To require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion. It may be that a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds, but it does not come within the prohibition of s.116.

1 Ibid., at pp. 126, 131.
2 Ibid., at pp. 160, 161.
3 (1912) 15 C.L.R. 366.
In 1956 the Menzies-Fadden government decided to give financial assistance to private schools in the Australian Capital Territory, most of which were conducted by or in association with religious denominations. The assistance was in the form of reimbursement of interest on capital borrowed for construction and extension of school buildings. Though the assistance was received by Roman Catholics and Anglican schools in that way, no legal action followed from other sections, such as Protestant religious interests opposed to such policies.

1 Refer to the Estimates in the Budget gabled on 3 September 1957, at p.152, under division No.280, paragraph D, item 11.

2 Apart from the necessity of stretching the interpretation of "any laws for establishing any religion" in s.116 to the relevant appropriation Act in its particular form, there is some conflict of opinion in decisions and dicta as to whether the Australian Capital Territory is governed under s.51(i) of the Constitution (relating to the seat of government) or under s.122 (relating to Federal Territories), or perhaps under both: see Ewens, "Where is the Seat of Government?" (1951) 25 Aust. L.J. 532. Before the decision in Lamshed v. Lake [1958] A.L.R.388, the preponderant authority suggested that under s.122 and possibly under s.51(i), Parliament in relation to such territories was completely sovereign and untramelled by the various prohibitions provided in the Constitution, such as s.116. But in Lamshed v. Lake, supra, though the Court was concerned with the general relation of Federal Territories to the Federal system and not with s.116, the majority held that generally speaking, s.122 should be regarded as an integral part of the system and not as something standing outside it. Dixon C.J. expressly said that s.122 was subject to s.116, at p.392.
But such an aid to religious schools raises an important issue similar to one which became a matter of controversy in the United States, in whose Constitution religious freedom is guaranteed to the citizens in the First Amendment as a restriction upon the Federal government, and later extended to the States by reason of its inclusion in the due process clause of the Fourteenth Amendment.

In the United States it has become a practice to provide various services and benefits in the form of free text-books, free medical service, or free lunches to children attending public schools where no religious education is given, and this is constitutional so long as the attendance of children at such schools is not made compulsory. But can these services and benefits be

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1 It runs: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the Press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances".

2 Just as the freedom of speech and of press have come to be regarded as a part of the liberty guaranteed by the Fourteenth Amendment, so too has the freedom of religion: Cantwell v. Connecticut (1940) 310 U.S. 296. Also refer to Lovell v. Griffin (1938) 303 U.S. 444; Schnieder v. Irvington (State) (1939) 308 U.S. 147.

extended to children attending private and parochial schools? It was held in Cochran v. Louisiana State Board of Education\(^1\) that the State could validly provide free text-books to all children attending schools including private and parochial schools. It was explained that in doing so it was not the schools which were the beneficiaries of these appropriations, but the school children and the State alone\(^2\).

A more difficult problem arose in Everson v. Board of Education\(^3\) where the appellant as a taxpayer challenged the action of a local school board in reimbursing parents the cost of transporting their children by bus to schools, including parochial schools, on the ground that it was an infringement of the First Amendment against establishment of religion made applicable to the States by the Fourteenth Amendment. It was held by a majority of five to four that the reimbursement of the bus fares to the children going to parochial schools was

\(^1\) (1930) 281 U.S. 370 (Cochran's Case).

\(^2\) Ibid., at p. 375. However, the plaintiff objected as a taxpayer whose money was being taken away for a private purpose, i.e., other than a public use, but did not raise the point of establishment of religion. The freedom of religion as a limitation upon the States was not established till then.

\(^3\) (1947) 330 U.S. 1 (Everson's Case).
valid and did not constitute an infringement of the First Amendment. The majority opinion was based mainly on the principle enunciated in Cochran's Case that the reimbursement was an aid to the school-going children and not to the religion.

There was no difference of opinion in that the States were forbidden to extend aid to religion directly or indirectly, and all the members of the Supreme Court spoke of the erection of a wall between church and State, but disagreed whether in this particular case religion was being aided. Mr Justice Black, speaking for the majority said: "The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools"1. On the other hand, the minority opinion appeared to be very forceful and equally convincing. Mr Justice Jackson dissenting referred to the historic conflict in temporal policy between the Catholic church and non-Catholics and its relative importance in the field of education, and pointed out that the basic fallacy in

1Ibid, at p. 18.
the Court's reasoning was in ignoring the essentially religious test by which beneficiaries of that expenditure were selected. He said that "the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayer's expense". Once these religious schools have received aid directly or indirectly, it is likely that at some stage they might find that it carried political strings with it, while "it was intended not only to keep the States' hands out of religion, but to keep religion's hands off the state, and, above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse". Mr Justice Rutledge, with whom Mr Justice Frankfurter, Mr Justice Jackson and Mr Justice Burton agreed, said that what mattered was that funds taken from one through taxation were not to be used or given to support, in fact and

1 Ibid., at p.26. By directly or indirectly, he meant whether the beneficiary of that expenditure of tax-raised funds was primarily the parochial school and incidentally the pupil, or whether the aid was directly bestowed on the pupil with indirect benefits to the school: at p.24.

2 Ibid., at pp. 26, 27.
not as a legal conclusion, another's religious training or belief; and for that matter their use did in fact give aid and encouragement to religious instruction - an aid to the children in a substantial way to get the very thing which they were sent to the particular school to secure, namely, religious training and teaching.

Though the dissent in Everson's Case is strong, it is likely that it may not be accepted in Australia. But financial assistance to schools for their building programme appears to be more obviously inconsistent with non-establishment of religion than the facts involved in Everson's Case, because the assistance in the former case is given directly to the schools and the 'child benefit theory' would be hard to apply.

Although in English history "establishment" has been associated mainly with the policy of giving a particular church some sort of monopoly as against other churches, it was the aspect of aiding a particular church at the expense of taxes levied on adherent and non-adherent alike that seemed most odious to the members of the United States Supreme Court. At the same time this aspect has not been neglected in the English history of disestablishment. Hence at first sight it might seem
stretching the meaning of "establishing" to monetary assistance, but it has substantial justification from the social history of the matter.

Mr Justice Frankfurter in Murdock v. Pennsylvania¹ said that "A tax can be a means for raising revenue, or a device for regulating conduct, or both". Similarly, an appropriation of tax levied and collected from persons generally may be used as an aid to religious schools, but "if the state may aid these religious schools, it may therefore regulate them"². Thus the constitutionality of a statute providing financial assistance to schools or private institutions, in whatever form, would depend upon its real purpose and if it is something other than "establishing any religion" or "imposing any religious observance" or "prohibiting the free exercise of any religion", s.116 of the Constitution may be applicable in Australia.

However, as pointed out earlier, in relation to the appropriation power there is also the problem of locus standi, i.e., how the expenditure is to be challenged in

¹ (1943) 319 U.S. 105, at p. 134.
² Everson v. Board of Education, supra, at p. 27.
judicial proceedings. The High Court has adopted a somewhat restrictive attitude towards permitting private persons to challenge government activities; it requires those activities to impinge in a direct and immediate sense on legal rights or privileges of the person objecting. It is a well-settled doctrine that merely being a taxpayer does not supply a sufficient interest to enable a person to challenge a federal appropriation law.\(^1\)

III

S.116 is a prohibition against the Commonwealth legislating with respect to religion. In other words, it expressly negatives the conferring of a power with respect to religion on the Commonwealth Parliament. Thus it is not a constitutional prohibition in the sense that like s.92 it restricts or limits the exercise of a legislative power. This factor explains the difference in approaches to s.116 and s.92 in their construction. If the law is not with respect to religion there is no question of an infringement of s.116. On the other hand, s.92 does not deal with the conferring

\(^1\) Anderson v. Commonwealth (1932) 47 C.L.R. 50.
of or taking away of a legislative power, but puts a limitation upon the legislative power of the Commonwealth and the States, so that they might not impair the freedom of inter-State trade, commerce and intercourse. Hence, in determining the validity of a law on grounds of s. 92 it is the ascertainment of "essence" and "accident" of the activity involved, not the characterisation of the law, that becomes relevant.

However, it may be noticed that though there is a difference in phraseology of the two sections, the freedoms guaranteed therein have been interpreted subject to the concept of ordered society involving their regulation within certain limitations. S. 116 denies the exercise of power with respect to religion, but it does not mean a complete denial so that a law cannot touch upon religious matters at all. If a law is made with respect to any other legitimate power and yet interferes with religion incidentally, it would not be an infringement of s. 116. Similarly a law imposing a restriction or burden or liability by reference to an "incident", not "essence", of an inter-State activity would not be an infringement of s. 92. However, in both cases a law would be subject to the operation of our maxim.
It is true that our maxim is applicable in so far as a law under the guise of dealing with respect to some legitimate power does not deal with respect to religion, and thereby infringe s.116. But normally proper characterisation of a law would take care of the maxim because what matters is the purpose with respect to which the inquiry is to be made. For example, in the Jehovah's Witnesses Case, Latham C.J. said: "The court will therefore have the responsibility of determining whether a particular law can fairly be regarded as a law to protect the existence of the community, or whether, on the other hand, it is a law 'for prohibiting the free exercise of any religion'. The word 'for' shows that the purpose of the legislation in question may properly be taken into account in determining whether or not it is a law of the prohibited character". 

1 (1943) 67 C.L.R. 116, at p. 132.
CHAPTER XI

Section 117 of the Australian Constitution

S. 117 is a limitation imposed upon the legislative power of the Commonwealth and the States, forbidding them to discriminate between persons on the ground of residence in another State. Its object is "to secure equality of treatment, in all the States, for subjects of the Queen resident in any State of the Commonwealth," and to create a status for subjects to "occupy a broader and more dignified relationship in his membership of the great federated community." Thus "whatever privileges are conferred upon residents of a State by its laws are to be taken to be equally conferred upon residents of other States, and that every enactment conferring such

1 It runs: "A subject of the Queen, resident in any State, shall not be subject in any other State to any other disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State".

2 See Wynes, Legislative, Executive and Judicial Powers in Australia (2nd ed.), at p. 149.


4 Ibid., at p. 955.
privileges is to be construed as including residents of other States\(^1\).

The basis of prevention of discrimination by s.117 is 'residence\(^2\)' and a person can invoke the section only on grounds of 'residence\(^1\)' in another State\(^2\). If there is discrimination between a resident of a State and those not resident in that State but resident in some other State, it would be a valid ground for avoidance of the law unless they are put on the same footing as the resident in that State. This is a provision capable of evasion by 'devices\(^3\)' and capable of protection by the ready application of our maxim.

The word 'residence\(^1\)' may be used in many senses, and the difficulty might arise as to which type is to be assumed as the basis of discrimination. Griffith C.J. in Davies and Jones v. Western Australia\(^3\), said: "I think it must be used distributively, as applying to any kind of residence which a State may attempt to make a basis of discrimination, so that, whatever that kind may be, "

\(^1\)Davies and Jones v. Western Australia (1904) 2 C.L.R. 29, at p. 38.


\(^3\)(1904) 2 C.L.R. 29, at p. 39.
the fact of residence of the same kind in another State entitles the person of whom it can be predicted to claim the privilege attempted to be conferred by the State law upon its own residents of that class". It suggests that there are different kinds of residence depending, of course, upon the duration of stay or degree of permanency in a State, but in the absence of any reference to it in the section, it might be inferred that all kinds of residence except mere casual presence, could become the basis of discrimination.

Can a discrimination on grounds of domicile be a discrimination on grounds of residence? In Davies and Jones v. Western Australia, it was held in the negative. That case involved the Western Australian Administration Act 1903, which provided for the payment of succession duty according to certain rules, but provided further that in respect of beneficial interest passing to persons bona fide residents of and domiciled in Western Australia and occupying towards the deceased person a certain relationship, duty should be payable at half the usual rates. One Mr A.E. Davies, one of the executors of Mr E.W. Davies, deceased, who was a bona fide resident of and domiciled in Queensland and occupied towards the
deceased the requisite relationship, when called upon to pay the duty at the usual rates, the plaintiffs (executors) claimed the same concession as the one available to a person bona fide resident of and domiciled in Western Australia within the meaning of s. 117. The claim was rejected on the ground that the basis of discrimination prescribed by the Act was 'domicile', and not 'residence', and consequently it was not a discrimination as between residents of Western Australia and others, but as between persons having their legal domicile in Western Australia and others.

The 'domicile' of a person, in general, is the country which is, in fact or considered by law, to be his permanent home, and the concept of home has a definite relationship with 'residence'. Domicile would ordinarily, but not necessarily, imply 'residence', and any discrimination on the ground of 'domicile' could imply discrimination on the ground of 'residence'. Thus the distinction between 'domicile' and 'residence' for purposes of s. 117 appears to be superficial, or rather artificial, and the decision in Davies and Jones v. Western Australia might well have

1 See Cheshire, Conflict of Laws (6th ed.) at p. 77.
been otherwise.

The purpose of s.117 was to protect an important aspect of federal structure, i.e., to prevent the States from fomenting disunity by discriminatory laws tending to produce a congeries of "State citizens." However, by giving a narrow and technical interpretation to 'residence' this purpose appears to have been frustrated, as under the guise of discriminating against a person on the basis of his 'domicile' a law could achieve what was supposed to be prohibited by that section.

This approach to s.117 is similar to that of 'essence' and 'incidents' applicable to the freedom of inter-State trade, commerce and intercourse guaranteed in s.92, for a law to be invalid on grounds of s.117 it must be by reference to 'residence' in the technical sense, i.e., 'essence' of 'residence,' and must not be confused with 'domicile' or any other concept with which it overlaps or has something in common. But it is the s.92 approach shorn of the flexibility produced by readiness to

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1 For fuller discussion see Stow, S.117 of the Constitution, (1905) 3 Commonwealth L. Rev., at p. 97.
recognise *disguised evasion*. However, with only one decision the doctrine cannot be regarded as finally settled. It is a tribute to the *friendly federal behaviour* of the Australian States that they appear to have made little use of the possibilities of abuse inherent in a narrow literal interpretation of s.117.
CHAPTERT XII

Legislative Schemes

One of the devices used to by-pass federal constitutional provisions, that has been a matter for discussion before the courts, is the "legislative scheme" consisting of two or more Acts enacted by one Parliament alone, or by two Parliaments or more (usually the federal Parliament and two or more State or Provincial ones). Such schemes raise controversial questions of substance and form because the enactments when considered by themselves are usually within the powers of the legislature concerned, but when the scheme as a whole is examined - by reference to its purpose disclosed by the inter-connection of the enactments or otherwise - it is seen to achieve something which could not be achieved in a single Act (if one Parliament is concerned), or by one Parliament acting alone (if two or more Parliaments are concerned). Thus the problem is posed whether the validity of the scheme is to be examined as a whole by reference to its purpose, without caring for the validity.

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of the scheme examined as a whole by reference to its purpose, or whether the validity of the enactments is to be examined individually but by reference to the purpose of the scheme. If the purpose of the scheme is relevant either in the examination of the scheme as a whole or of the enactments individually, the further question arises whether the courts could call for evidence in order to form an opinion as to the validity of the purpose itself. If the validity of the enactments is not tested by reference to the scheme, it becomes apparent that "legislative schemes" could be so devised as to achieve a purpose which could not be achieved directly by legislatures acting within their constitutional powers. These are the questions which came up for discussion before the courts.

II

Moran's Case

In 1938 pursuant to a conference attended by representatives of the Commonwealth and all the States, a scheme was evolved to ensure to wheat growers a payable

price for wheat throughout Australia; special treatment was given to Tasmania due to the special circumstance that it was the only State importing most of its wheat from other States. The scheme as a whole was contained in six Commonwealth Acts which imposed taxes on wheat and flour, provided for their assessment and collection, and directed the payment of the proceeds to the States, and in State Acts which provided for payment of these grants to wheatgrowers by way of subsidy or assistance. In the case of Tasmania, however, the Commonwealth grant included an additional amount substantially the same as the amount of tax raised in Tasmania, and a Tasmanian Act provided for the distribution of this additional grant amongst payers of the tax on flour consumed in that State. The result of the scheme was explained by Latham C.J., thus:

A Federal excise duty is imposed upon flour which is paid upon the same basis by persons in all the States. The proceeds of the duty go into the Federal Consolidated Revenue. An equivalent sum is then taken from the consolidated revenue and is paid by the Commonwealth by way of financial assistance to the States of the Commonwealth, upon condition that the States apply the moneys in the assistance and relief of wheat growers. In the case of Tasmania, however, a special grant is made by the Commonwealth which is not subject to any Federal statutory conditions, but which, in fact, is applied, and which it was known would be applied, by the Government of Tasmania in
paying back to Tasmanian millers and others nearly the whole of the flour tax paid by them in respect of flour consumed in Tasmania.¹

In an action brought in a District Court a company, on being sued for the amount of the tax, raised the defence that the tax was *ultra vires* of the Commonwealth. The case was removed to the High Court under s. 40 of the Judiciary Act 1903-1937, and Evatt J. referred it to the Full Court.

The main objections² against the scheme were firstly that it involved an imposition of a tax which infringed s.51(ii) of the Constitution by discriminating against the States other than Tasmania, and secondly, that the payments made to the States were bounties on the production or export of goods and they were not uniform, thereby infringing s.51(iii) of the Constitution. The High Court, Evatt J. dissenting, held that the scheme was not invalid on any of these grounds. An appeal to the Privy Council failed.

The contention of the defendants was based on the

¹(1939) 61 C.L.R. 735, at pp. 756, 757, per Latham C.J.
²There were other objections but they are not important in the present context.
fact that a statute apparently valid when considered by itself, might nevertheless be held to be invalid if it were part of a scheme for achieving a prohibited purpose. Thus it was argued that if Tasmania's potential taxpayers had simply been excluded from the payment of the tax, the taxing Acts would have clearly been bad because s.51(ii) of the Constitution prohibited such discrimination, but the same result was produced by collecting the tax from Tasmania and then paying it, or most of it, back to Tasmania. The majority in the High Court did not accept this contention. Their Honours were of the view that the proper way was to examine the Acts one by one and if each appeared not to contravene any provision of the Constitution, the scheme as such was valid because the Court was not concerned with the motives of the legislature. As Starke J. said:

The legislative bodies of the Commonwealth and the States were each entitled to use to the full the powers vested in them for the purpose of carrying out the scheme. Co-operation on the part of the Commonwealth and the States may well achieve objects that neither alone could achieve; that is often the end and the advantage of co-operation. The court can and ought to do no more than inquire whether anything has been done that is beyond power or is forbidden by the Constitution.

Thus the special treatment which was given to

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(1939) 61 C.L.R. 735, at p. 774.
Tasmania did not arise from any discrimination in any law passed by the Federal Parliament with respect to taxation. As regards the argument relating to the appropriation of money towards the desired objects by the Federal Parliament, it was observed that it was an Act appropriating money and was not with respect to taxation, and there was no provision in the Constitution to the effect that appropriation Acts must not discriminate between States. Further it was admitted that if any discrimination was caused, it was under the Tasmanian legislation which provided for payment of relief to Tasmanian taxpayers out of the sum paid to the government of Tasmania by the Commonwealth; but again it could not be an infringement of s.51(ii) as that section did not apply to the Tasmanian Parliament. "Such a law," said the Chief Justice, "might be open to political objection, but no remedy could be obtained by any objection in the courts"\(^1\).

Following the same logic, objections on the ground of s.51(iii) also failed, as the Chief Justice pointed out\(^2\), for several reasons: (1) payments made by the Commonwealth

\(^1\) *Ibid.*, at p. 758.

were not bounties upon the production or export of goods, (2) a wheat grower who received payment from a State did not receive it in respect of wheat produced or exported but only in respect of wheat which he sold or delivered for sale, (3) every wheat grower in all the States was treated in the same way, as he was to receive moneys in proportion to the quantity of wheat sold or delivered for sale by him.

The Commonwealth Appropriation Acts were held to be justified by virtue of s.96 of the Constitution which, it was thought, enabled the Commonwealth Parliament to grant financial assistance in a manner discriminating between States. Starke J. said:

The Constitution in sec. 96 explicitly enacts that financial assistance may be granted to any State, which makes plain that a grant under this section to one or more States and not to others is no infringement of sec. 99 of the Constitution.¹

Evatt J. differed from other members of the Court and was of the opinion that "there has been a very thinly disguised, almost a patent, breach of the provision against discrimination; and the especial significance of the present case lies in its result, which practically

¹ Ibid., at p. 775.
nullifies a great constitutional safeguard inserted to prevent differential treatment of Commonwealth taxpayers solely by reference to their connection or relationship with a particular State". Agreeing with the contention of the defendants he said that the unconstitutional discrimination would have been plainly evident if the taxpayer, though not granted a formal exemption, was entitled to a refund of the tax already paid by him, the Commonwealth providing the necessary funds from the proceeds of the flour tax and payment being made to the taxpayer by some person designated by the Commonwealth government. But it would amount to the same effect even though following "the less direct but very convenient method", i.e., by selecting "the State of Tasmania itself as the proper and convenient authority for the purpose of acting as the Commonwealth's conduit pipe for the refund of Commonwealth tax". Thus "in substance and reality", he continued, "the Commonwealth saw to it that a special section of its taxpayers were granted an exemption, that exemption proceeding solely by reference to the benefiting of Tasmanian taxpayers and Tasmanian consumers".

1 Ibid., at p. 778.
2 Ibid., at p. 785.
3 Ibid., at p. 787.
Evatt J. pointed out that the principle applied in the characterisation of a legislation, that legislation which at first appeared to conform to constitutional requirements might be void of colourable or disguised, was equally applicable to a "legislative scheme" such as the one under consideration. Thus the main task was to pick out the purpose of the scheme, and the validity of enactments comprising the scheme would depend upon the validity of that purpose. Looking at the facts, the additional payment to Tasmania could not be dissociated "from the purpose which has been stamped upon it by the Commonwealth's adherence to the scheme", and the taxation discrimination was not merely the result of the Tasmanian Act. Thus "it is the result of the combined operation of the Commonwealth's imposition of flour taxes and the Commonwealth's special grant to one State for the purpose of refunding the tax to Commonwealth taxpayers who are associated with that one State". As to s.96, it was said that it could not be employed for the very purpose of nullifying guarantees provided elsewhere in the Constitution.

1 Ibid., at p. 794.
2 Ibid., at p. 801.
3 Ibid., at p. 803.
4 Ibid., at p. 802.
On appeal, the Privy Council recognised in principle the view adopted by Evatt J. but disagreed with his application of that principle in this instance. Their Lordships approving the principle laid down in the majority opinion in R. v. Barger, thought that where there was admittedly a scheme of proposed legislation, it was necessary to examine the Acts constituting the scheme together. "The separate parts of a machine", added their Lordships, "have little meaning if examined without reference to the function they will discharge in the machine." For example, though the Commonwealth Parliament felt obliged by s.55 of the Constitution to provide separate tax and tax-assessment Acts, a taxation Act had to be examined along with an appropriation or tax-assessment Act authorising exemption, abatements or refunds of tax to taxpayers in a particular State for the purpose of s.51(11), s.51(iii) or s.99, otherwise it would be turning "a blind eye to the real substance and effect of the Acts". But their Lordships, in contrast with Evatt J., came to the conclusion that there was nothing objectionable in the scheme

1 (1940) 63 C.L.R. 338 (P.C.).
2 (1908) 6 C.L.R. 41, at pp. 74, 75.
3 (1940) 63 C.L.R. 338, at p. 341.
4 Ibid., at p. 346.
as the purpose of providing financial assistance to Tasmania was to prevent "unfairness or injustice" to that State by having a fair distribution of the tax imposed by the Commonwealth Taxation Acts.

Further, the contention of the appellants that no grant of financial assistance could be made to any State which created any discrimination, directly or indirectly, between States, so as to infringe s.51(ii), was rejected on the ground that such a contention would be beyond the scope of the prohibition contained in s.51(ii) and it would be a mistake to regard that prohibition as providing for equality of burden as regards taxation. Their Lordships said:

The pervading idea is the preference of locality merely because it is locality, and because it is a particular part of a particular State. It does not include a differentiation based on other considerations, which are dependent on natural or business circumstances, and may operate with more or less force in different localities.

As regards s.96, their Lordships tried to reach a sort of compromise between that section and s.51(ii) and s.51(iii) in the sense that s.96, apart from the prohibitions contained in s.51(ii) and s.51(iii), did not

1 The prohibition contained in s.51(iii) was also regarded as not providing for equality of benefit as regards bounties.

prohibit discrimination between States or parts of States in the matter of financial assistance to one or more States. Thus it would be a permissible discrimination if the Commonwealth Parliament passes a law "in concert with any State or States with a view to a fair distribution of the burden of the taxation proposed, provided always that the Act imposing taxes does not itself discriminate in any way between States or parts of States, and that the Act granting pecuniary assistance to a particular State is in its purpose and substance unobjectionable".

The difference of opinion that arose between Evatt J. and their Lordships was primarily due to the fact that they adopted different criteria in order to apply the prohibition contained in s.51(ii) and s.99. Evatt J. emphasised the formal consideration that the Tasmanian millers were given a preferential treatment by receiving a certain percentage of the money paid by them as tax. "True", said he, "the Commonwealth would collect from all taxpayers alike; but it would refund the tax solely because of considerations applicable to a single State".

1 Ibid., at p. 349. (Italics supplies).
2 (1939) 61 C.L.R. 735, at p. 783.
However, their Lordships looked into the material justification for the scheme: "Those powers are plainly being used for the purpose of preventing an unfairness or injustice to the State of Tasmania or indirectly to some or all of its population". It is submitted that the latter approach does not appear to be the right one as it would involve undefined social, economic and political considerations which create uncertainty in results, and such considerations have usually been discouraged in constitutional inquiries. The prohibitions contained in s.51(ii) and s.99 were intended by the framers of the Constitution to establish formal and not material equality, and this scheme achieved formal inequality.

Their Lordships visualised that prima facie there was no limitation upon the exercise of the power conferred on the Commonwealth by s.96, but a tax-assessment Act (granting money to the States) passed in conjunction with a tax Act which does not itself discriminate in any way between the States, may still be held invalid under

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1 (1940) 63 C.L.R. 338, at p. 349.
the prohibition contained in s.51(ii) or s.99. Their Lordships issued a warning: "Cases may be imagined in which a purported exercise of the power to grant financial assistance under s.96 would be merely colourable. Under the guise or pretence of assisting a State with money, the real substance and purpose of the Act might simply be to effect discrimination in regard to taxation." But then could it not be said that the scheme in the present case was a colourable exercise of s.96 so as to nullify the constitutional safeguard provided in s.51(ii) or s.99? According to Evatt J. it was; but their Lordships justified it by saying that it was for the purpose of equalising the burden in the incidence of taxation by way of providing financial assistance to hard cases. However, it would be difficult to prove any scheme as a colourable exercise as it could always be justified for one reason or another, based on material considerations. Their Lordships also realised that such a case might never be proved. In this respect, this warning becomes almost illusory.

However, the importance of this warning lies in the recognition of our maxim, and the readiness on the part

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(1940) 63 C.L.R. 338, at p. 350.
of the Courts to call for evidence to determine the purpose of legislative schemes. In a way it is the affirmation of the principle explained and applied by Evatt J. in his dissent.

III

Land Settlement Cases

These cases illustrate that if two or more Acts are clearly inter-connected through an agreement reached between two or more governments, the Acts would be considered as constituting a scheme and their validity would be examined by reference to the purpose of the scheme as a whole. Also an Act approving and ratifying an agreement reached between the Commonwealth and a State is inoperative if the agreement turns out to be invalid even though the legislatures have the constitutional power to act to the same effect without referring to the agreement at all.

In Magennis1 Case, an agreement was made between the Commonwealth and the State of New South Wales with a view

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1 P.J. Magennis Pty Ltd v. Commonwealth (1949) 80 C.L.R. 382 (Magennis' Case); Tunnock v. Victoria (1951) 84 C.L.R. 42; Pye v. Renshaw (1951) 84 C.L.R. 58.
to the settlement on land in the State of discharged members of the Forces and other eligible persons; the agreement was ratified and provision made for its execution in the case of the Commonwealth by the War Service Land Settlement Agreements Act, 1945, and in the case of New South Wales by the War Service Land Settlement Agreement Act, 1945. Under the agreement both parties assumed financial and other obligations, but the State was to acquire the land required for the purpose, compulsorily or by agreement, at a value not exceeding that ruling in 1942. A similar term was contained in a proviso to s.4(1) of the Closer Settlement (Amendment) Act 1907-1948 (N.S.W.) with respect to land acquired for the purpose of the scheme contained in the agreement. Under s.4 of the Closer Settlement Acts, the government of New South Wales made a proclamation notifying that it proposed to consider acquiring the plaintiff's land for purposes of closer settlement. The plaintiff then brought an action in the High Court against the Commonwealth and the State of New South Wales alleging that the State of New South Wales threatened and intended to resume the plaintiff's land for the purposes of the agreement, and that the Commonwealth threatened and intended to pay moneys for such resumption; the plaintiff claimed a
declaration that the agreement was void and inoperative, that the Commonwealth Act authorising it was ultra vires, and that the provisions of the Closer Settlement ( Amendment ) Act, and in particular s.5, were invalid; he claimed an injunction restraining the State from resuming the land and the Commonwealth from paying moneys for such resumption.

It was held by Latham C.J., Rich, Williams and Webb JJ. ( Dixon and McTiernan JJ. dissenting), that the acquisition of the land would be unconstitutional on the ground that the Commonwealth Act was an Act with respect to the acquisition of property upon terms which were not just and was invalid under s.51( xxxi ) of the Constitution; that the agreement authorised by the Act was accordingly invalid; and that as the purpose of the agreement failed, the State Acts were inoperative so far as they related to and purported to give powers to resume land for the purposes of the agreement.

This legislative scheme was designed to enable the Commonwealth to escape from the constitutional limitation

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It provides: "The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws."
contained in s.51(xxxi) of the Constitution by using State legislative powers; the States are not subject to any constitutional guarantee requiring the payment of "just" or indeed any compensation for property they acquire from the subject. The land was to be acquired for the settlement of ex-servicemen, which could clearly be regarded as a Commonwealth purpose under the defence power (s.51(vi) of the Constitution) though probably not within the portion of the defence power exclusive to the Commonwealth. However, it should be mentioned that the practice of using State power for land settlement of veterans was established after the first world war and there were administrative and economic justifications for the practice apart from the question of terms of acquisition.

The question then posed was whether the Parliaments of the Commonwealth and the State of New South Wales had by joint action succeeded in evading the constitutional obligation of the Commonwealth Parliament to provide just terms when it made a law with respect to the acquisition of property for a purpose for which the Commonwealth Parliament had power to make laws. The majority answered in the negative.
Latham C.J. said that a law made under s.51(xxxi) must provide just terms for the acquisition of property "whether the acquisition be by the Commonwealth or by a State or by any other person". There was nothing in s.51(xxxi) limiting its application to either a law which directly acquired property by force of its own terms or created a previously non-existing power in some person to acquire property or which came into operation upon the acquisition of property. Williams J. added that "any legal interest including a contractual interest would be sufficient if it made the acquisition one for such a purpose". In the same tone Webb J. said that s.51(xxxi) provided for a law with respect to the acquisition of property, and these words should be given their fullest meaning consistent with other provisions of the Constitution. Applying these criteria the Commonwealth Act was, under the circumstances, judged as an Act with respect to the acquisition of property. Referring to the agreement, the Chief Justice explained:

It is true that the Act is a law authorizing only the execution of the agreement, but the

1 (1949) 80 C.L.R. 382, at p. 402.
2 Ibid., at pp. 423, 424.
3 Ibid., at pp. 429, 430.
whole subject matter of the agreement is the acquisition of property upon certain terms and conditions for certain purposes. The provisions of the agreement are directed to the acquisition of property and the agreement becomes effective in achieving its objective of the settlement of discharged servicemen only when property has been acquired. I can see no reason whatever for holding that a law approving an agreement of such a character as this is not a law with respect to the acquisition of property.¹

Dixon and McTiernan JJ. thought that the Commonwealth Act was not a law with respect to the acquisition of property that must be justified by s.51(xxi). The Act simply authorised the execution of the agreement and secured its Parliamentary approval. Dixon J. said:

But it goes no further. It does not otherwise change the legal character of the instrument or of the transaction it embodies. It certainly does not convert the terms of the agreement into the provisions of a law. The statute does not authorize the acquisition of property. It contains no provision whatever about property. It is entirely concerned with the execution of an agreement. I should say that it was a law with respect to a matter incidental to the execution of a power vested by the Constitution in the Government of the Commonwealth and was an exercise of the legislative power conferred on the Parliament by par. (xxxix) of s.51.²

Co-operation between the Commonwealth and the States is one of the devices to achieve a certain object that

¹ Ibid., at p. 402.
² Ibid., at pp. 410, 411.
neither could achieve. The object may often be the end or ultimate indirect consequence, and in such a case the Acts constituting the scheme would be valid provided each legislature acted within its constitutional power. However, if the Acts are interconnected, or there are circumstances so as to raise a strong presumption to that effect, the validity of the Acts might be examined by reference to the object of the scheme. In the present case, though the Commonwealth Act was not directly connected with the State Acts, the circumstance that it made a specific reference to the agreement which also formed the basis of the State Acts, might have swayed the majority opinion in characterising the Act with respect to the acquisition of property.

However, the State Acts, according to the majority, became inoperative simply because they were made in furtherance of an invalid agreement, even though the State legislature was acting within its powers. Latham C.J. argued thus:\footnote{Ibid., at pp. 403, 404.}

\begin{quote}
But that which the State Act approves is an agreement made between the State and the Commonwealth. If the agreement cannot validly be made by the Commonwealth then it cannot be
\end{quote}
valid as an agreement between the State and the Commonwealth. The agreement cannot be valid as an agreement in the case of the State and invalid as an agreement in the case of the Commonwealth. The operation of the agreement depends at all points upon action by the Commonwealth in pursuance of the agreement and upon the undertaking and performance by the Commonwealth of definite pecuniary obligations under the agreement. The State Parliament has not enacted the terms of the agreement as provisions of a statute, but has only approved the making of the agreement as an agreement. If the agreement completely fails on the side of the Commonwealth it also completely fails as an agreement on the side of the State. The result therefore is that as the State legislation only approved that which was treated by the legislation as amounting to an agreement if executed by both the Commonwealth and the State, and as that agreement is not valid, the State also is not bound by the agreement and the State Act approving the execution of the agreement therefore did not come into operation. The result is not that the State Act is invalid, but simply that it has no effect.

Or to put it in the words of Williams J., who used similar reasoning:

Its true meaning is that the State is intending to resume the land for the purposes of the agreement and therefore to pay compensation on the semi-confiscatory basis provided for in the amending Closer Settlement (Amendment) Acts of 1946 and 1948.¹

These statements raise the important question in the construction of statutes, whether a term such as the validity of an agreement could be implied so as to make

¹Ibid., at p. 420.
such validity a necessary condition for the enforcement of the statute. It is submitted that the operation of a statute should not depend upon such questions unless an intention to that effect is clearly expressed. As remarked by Dixon J., the majority view has "no warrant either in principle or in precedent". Referring to the relevance of the agreement in this context, he said that the State legislation implied nothing as to the agreement's legal status or enforceability; still less did it imply that its provisions would have no application if it was found that the agreement was not a binding obligation of the Commonwealth, legally enforceable in the Courts. It may be added that the Court's concern is to examine the validity of a statute and not the desirability of circumstances which led to the passing of the statute. But the majority first examined the validity of the agreement which was "in the nature of a political arrangement between the Commonwealth and the State" by reference to the Commonwealth Act, and then implied its validity as a necessary condition for the enforcement of the State legislation. There is nothing wrong in referring to the agreement; such reference has to be made since the State

1 Ibid., at p. 408.
legislation takes the form of authorising or approving it. But what is objectionable is to make the legal status or enforceability of the agreement a relevant factor. Can a State restrict its legislative power defined in the Constitution by making such an agreement? "It would be surprising", observed McTiernan J., "if by making this agreement with the Commonwealth the State restricted its legislative power, including its power to resume land within the State by importing into its Constitution a condition in the Commonwealth Constitution restricting Commonwealth power only".

The subsequent decisions of the High Court limited the scope of Magennis' Case to a situation where a legislature exercises its power by making specific reference to an agreement or a law which is not valid. If the Commonwealth and the States agree to enforce a scheme through joint co-operation, they can do so by making no reference to such agreement or law, at the same time embodying its terms within the framework of the statutes constituting the scheme, thereby making the operation of the statutes legally independent of the agreement and independent of each other's relevant laws.

1 Ibid., at p. 416.
This was what actually happened in *Pye v. Renshaw*\(^1\), and also in *Tunnock v. Victoria*\(^2\).

After the decision in *Magennis* Case, the War Service Land Settlement Agreement Act 1945 (N.S.W.) was repealed and a new law was passed by the State legislature. This amended the new sub-section which had been added in 1946 to s.4 of the Closer Settlement (Amendment) Act 1907, by deleting all reference to any agreement with the Commonwealth and by inserting in lieu thereof a reference to land resumed for the purposes of s.3 of the War Service Land Settlement Act 1941 (Cwth.). S.3 of the Act authorised the Minister to set apart any area of Crown land, or land acquired by the Crown, to be disposed of exclusively to discharged members of the forces and certain other classes of persons. In *Pye v. Renshaw*, it was held unanimously that the State legislation was not rendered void by the existence of an agreement between the Commonwealth and the State of New South Wales relating, *inter alia*, to the identity of the lands resumed, the class of persons who might be settled thereon or the terms upon which such persons might be settled.

\(^1\)(1951) 84 C.L.R. 58.
\(^2\)(1951) 84 C.L.R. 42.
It was said that the Commonwealth Act of 1941 did not relate to the acquisition or resumption of land and the State legislation was intended to take effect unconditioned by any Commonwealth legislation and irrespective of the existence of any agreement between the Commonwealth and the State.

It would have made no difference even if the Commonwealth law had not been valid. In Tunnock v. Victoria, Magennis' Case was distinguished on the ground that the Soldier Settlement Acts 1945-1949 (Vic.) did not depend for their operation upon the existence of an agreement between the Commonwealth and the State and were, therefore, not affected by the invalidity of the War Service Land Settlement Act 1945 (Cwth.).

It may be noted that the State legislation involved in Magennis' Case differed only in form from that involved in Tunnock v. Victoria and Pye v. Renshaw. The Acts were substantially the same except that in one case the agreement was specifically mentioned, while in the other, it could be inferred from the circumstances that the agreement was the basis of the State Acts in fact. Further, in both cases the purpose of the scheme as a whole was the same, i.e., acquisition of land on terms
which were not just under s.51(xxxi) for closer settle-
ment of a certain class of persons on that land. If the
decision in the later cases is correct (it is submitted
that it was so), *Magennis* Case may be said to have been
virtually overruled.

The weakness in the majority judgment of *Magennis* Case became more apparent from the fact that no reference
to it was made in *Brown v. Green*¹, a case in which the
operation of a State Act incorporating determinations
made under Commonwealth regulations which had ceased to
operate was questioned. S.4(1) of the Landlord and
Tenant (Amendment) Act 1948-1949 (N.S.W.), which related
to the control of the relation of landlord and tenant,
provided that all determinations of fair rents made
before the commencement of the Act under the National
Security (Landlord and Tenant) Regulations², and having
force or effect in the State immediately before such
commencement should be deemed to have been made under
the Act and, subject to the Act, should continue to have
force and effect accordingly. The defendant first

¹ (1951) 84 C.L.R. 285.
² As in force immediately before the commencement of the Act under the Defence (Transitional Provisions) Act 1946-
1947 (Cwth.).
questioned the continued validity of the regulations and then argued that the State Act also became inoperative because the determinations could not have any force or effect in the States unless the regulations themselves were valid. But the High Court held that the constitutional validity of the regulations was not an essential condition of the application of the State legislation to determinations of fair rent made under these regulations. Dixon, McTiernan, Webb, Fullagar and Kitto JJ., in their joint judgment said: "The language of the Act does not require that it shall be supposed that their constitutional operation was an essential condition of its application to existing determinations and there is not sufficient reason why it should be so construed as importing such a condition"¹. This is, in a way, a vindication of the minority judgments in Magennis Case.

But Brown v. Green may be distinguished from the Land Settlement Cases on a much broader issue, based on the fact that in the former the operation of the scheme hinged only on the operation of the State legislation and the constitutional validity or invalidity of the Commonwealth regulations did not matter, whereas in the latter, 

¹ (1951) 84 C.L.R. 285, at p. 292.
as the scheme consisted of the State as well as the Commonwealth legislation, it was necessary for both to have continued operation for the successful operation of the scheme as a whole. Suppose if one limb of the scheme, say the Commonwealth legislation, turns out to be invalid, as was the case in Magennis Case, does it mean that the other limb, the State legislation, also falls down accordingly as the very purpose of the scheme is frustrated? This question has not yet been discussed squarely by the courts. Latham C.J. would, as is indicated in his opinion in Moran's Case, prefer to treat each Act individually on its own merit and the chances are that he might not have invalidated the State legislation on this particular ground. Perhaps the same conclusion may also be inferred from the opinion of the Privy Council in the same case. Though their Lordships suggested that the taxation Act and the tax-assessment Act - it is implied that both Acts were passed by the same legislature - be treated together, no reference was made to the Tasmanian Act which also formed part of the legislative scheme. Thus even on this ground it is rather doubtful if the majority opinion in Magennis Case can be supported.
However, Magennis Case has not yet been overruled, but, as explained earlier, its application could be avoided by making no reference to an agreement made between the Commonwealth and the States. It was through this device that the Commonwealth Air Navigation Act, 1920-1950, has been extended to intra-State navigation, which is beyond Commonwealth powers. The Victorian Air Navigation Act, 1958, made no reference to the conference of representatives of the Commonwealth and of the States held in 1937 (except in the Preamble) or the Commonwealth Act; on the other hand, it referred to the regulations applicable to and in relation to air-navigation within the Territories and applied them, mutatis mutandis, to and in relation to air navigation within Victoria. By doing so the State Act also avoided all doctrinal difficulties in the way of the Commonwealth Parliament acting in pursuance of an International Convention.

1 At the conference it was resolved that there should be uniform rules throughout the Commonwealth applying to air-navigation and aircraft, and it was agreed that legislation should be introduced in the Parliament of each State to make provision for the application of the Commonwealth Air Navigation Regulations, as in force from time to time, to air navigation and aircraft within the jurisdiction of the State.

Uniform Taxation Cases

These cases illustrate a situation in which a result which could not have been achieved by a single Act could be achieved through a combination of several Acts enacted by a legislature acting under different powers and thus displaying a limitation upon our maxim in its application to legislative schemes. The High Court was reluctant to treat a legislative scheme as a whole and preferred to examine the validity of the Acts comprising the scheme individually.

In *South Australia v. Commonwealth*[^1], the legislative scheme consisted of four Commonwealth Acts: (1) the Taxation Act 1942 imposing tax on income at a very high rate so as to make it practically impossible for the States to impose any tax on income; (2) the States Grants (Income Tax Reimbursement) Act 1942 making annual grants to each State upon condition of that State not imposing any income tax in each relevant year - the grants being

[^2]: (1942) 65 C.L.R. 373 (the First Uniform Tax Case).
reimbursements in respect of income tax revenue lost by the State; (3) the Income Tax Assessment Act 1942, giving priority to the Commonwealth over the States in respect of payment of income tax; (4) the Income Tax (War-time Arrangements) Act 1942 providing for the temporary transfer to the Public Service of the Commonwealth of officers of the State service. The main object of these Acts "was to introduce into Australia a uniform income tax having priority over State taxes upon income, paying to the States, which retired from the field of income taxation, compensation substantially equal to the average of the amounts raised by that State by means of income tax in the financial years ended June 1940 and 1941".¹

The first two Acts were challenged by the plaintiffs on the ground that they operated to destroy the constitutional power and function of the States to legislate for the imposition of income tax; that taxation was an essential activity of government; that the Commonwealth Parliament had no power to impede, weaken or destroy that activity; and that the Acts were therefore invalid².

¹ Ibid., at pp. 447, 448.
² The Acts were also objected on grounds of s.51(ii) and s.99 of the Constitution.
The two latter Acts were explained as carrying out the scheme contained in the first two Acts and they were therefore also challenged on the same ground. But in the High Court the scheme was held valid by varying majorities as to the different Acts. The Income Tax Act and the Grants Act were held valid by Latham C.J., Rich, McTiernan and Williams JJ., Starke J. agreeing as to the validity of the Income Tax Act but dissenting as to the validity of the Grants Act. Williams J. held the Grants Act valid on the ground that the condition of State abstention from imposing income tax was incidental to the defence power. The Assessment Act was unanimously held valid, McTiernan J. being of the view that the priority given to the Commonwealth tax was incidental to the defence power. The War-time Arrangements Act was held valid by Rich, McTiernan and Williams JJ., with Latham C.J. and Starke J. dissenting, solely under the defence power.

It is true that the Grants Act, when examined in isolation, might be valid, but what was sought to be achieved in effect was that the States should vacate the field of taxation, and in so far as that aim was to be achieved, it was inevitable that the Tax Act should levy
a high rate of tax. To this extent the Tax Act was also involved so that one could obtain a clear picture of what was being contemplated by the Commonwealth. Thus it was contended that an Act which did not refer to or incorporate any other Act, and which when considered by itself was not invalid, might be held to be invalid by reason of the enactment of other Acts. But Latham C.J. visualised many difficulties in accepting that contention. The Chief Justice said: "Parliament, when it passes an Act, either has power to pass that Act or has not power to pass that Act. In the former case it is plain that the enactment of other valid legislation cannot affect the validity of the first-mentioned Act if that Act is left unchanged. The enactment of other legislation which is shown to be invalid equally cannot have any effect upon the first-mentioned valid Act, because the other legislative action is completely nugatory and the valid Act simply remains valid." These observations are only an addendum to what was already expressed in Moran's Case.

However, Latham C.J. did not think it necessary in

1 (1942) 65 C.L.R. 373, at p. 411.
2 (1939) 61 C.L.R. 735, at pp. 761, per Latham C.J.
the present case to examine the Acts as parts of a legislative scheme. He said: "The intention to get rid of State income tax and of State income tax departments is clear in the case of the three first-mentioned Acts\(^1\), and if such an intention is fatal to the validity of Commonwealth legislation it is not necessary to allege or prove any 'scheme'\(^2\). But the very fact that the intention or purpose may be fatal is precisely the reason why it is necessary to allege or prove any scheme. It is by reference to that intention or purpose that the validity of Acts constituting the scheme is to be determined. Of course, purpose may not be confused with motive or ultimate indirect consequences which are irrelevant in law.

Starke J. joined hands with the Chief Justice in dealing with the Acts separately, but on a different ground. "But the scheme of legislation is", he thought, "unimportant unless the legislation is connected together and the provision of the legislative Acts are dependent the one

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\(^2\) (1942) 65 C.L.R. 373, at p. 411.
upon the other. It was found that such was not the case here. This approach seems to be not inappropriate, as what the Commonwealth Parliament intended to do could only be legitimately ascertained from that which it had enacted, either in express words or by reasonable or necessary implication.

However, as suggested by their Lordships in Moran's Case, though two or more Acts might not be expressly inter-connected, it might be impossible to separate one Act from another when examined in their context or setting, e.g., a taxation Act and an appropriation or tax-assessment Act. In such a case it would be necessary to examine the Acts constituting a scheme as a whole. Williams J. seemed to have noticed such a connection in the present case. He said: "Where there are several Acts having, as in the present case, a clear interaction, the Court is entitled to investigate the substance and purpose of each Act in the light of the knowledge disclosed by them all". However, to notice a clear connection or interaction in between the Acts so as to

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1 Ibid., at p. 448.
2 (1940) 63 C.L.R. 338 (P.C.), at pp. 341, 345 and 346.
3 (1939) 61 C.L.R. 735, at p. 462.
constitute a scheme in a certain context or setting may be a matter of opinion.

The legislative scheme was originally introduced during the war-crisis in 1942, but it was continued in substantially the same form even after the war was over. The Income Tax Act, 1942, had been succeeded by a series of annual taxing Acts. 'Provisional Tax' was also introduced in 1944 by the Income Tax Assessment Act, whose title was later changed to the Income Tax and Social Services Contribution Assessment Act in 1950. S.221 of the Income Tax Assessment Act, 1942, which was introduced into that Act as an amendment to s.31 of the Assessment Acts 1935-41, was amended by s.20 of the Income Tax Assessment Act, 1946, so as to be "for the better securing to the Commonwealth of the revenue required for the purposes of the Commonwealth", whereas formerly it was "for the better securing to the Commonwealth of the revenue required for the efficient prosecution of the present war". This provision was thus meant to operate permanently. The States Grants (Income Tax Reimbursement) Act 1942 was repealed by the States Grants (Tax Reimbursement) Act 1946, which was amended in 1947 and 1948; the States Grants (Special Financial
Assistance) Acts were enacted for each year from 1951 to 1956, supplementing the grants already made under the 1946-48 Act. The Income Tax (War-time Arrangements) Act 1942 was discontinued as it had done its work.

In the First Uniform Tax Case\(^1\), it was the defence power that loomed large\(^2\), irrespective of the fact that most of the reasoning in the majority opinion was not based on it. The circumstances changed after the war and it could not be said with certainty whether the scheme could be validly continued in peace-time. Furthermore, doubts arose as to the validity of the scheme after the decision in Melbourne Corporation v. Commonwealth\(^3\), in which the doctrine of federal implications was revived in a modified form.

Thus the validity of the Acts constituting the legislative scheme was challenged for the second time in Victoria v. Commonwealth\(^4\). This time the plaintiff

\(^1\) (1942) 65 C.L.R. 373.
\(^2\) The Income Tax (War-time Arrangements) Act was held valid solely under the defence power and it was that Act which enabled the Commonwealth to take over the staff, records and offices of the State departments. See also (1942) 65 C.L.R. 373, at pp. 463, 464, per Williams J.
\(^3\) (1947) 74 C.L.R. 31.
\(^4\) (1958) 99 C.L.R. 575 (the Second Uniform Tax Case).
States, Victoria and New South Wales, did not make an attack on the validity of all the relevant Acts as constituting a legislative scheme for an unconstitutional purpose. Instead they claimed declarations (i) that the Grants Act was invalid because it did not grant financial assistance within the meaning of s.96, and further it interfered with the States in the exercise of their power to impose income tax and so interfered with their independence; (ii) that s.221 of the Assessment Act 1936-1956, which gave Commonwealth tax priority over State tax, was invalid mainly on the ground that it was not authorised by any provision of the Constitution; (iii) that the Grants Act and the Assessment Act, s.221, taken together, having regard to the Tax Act, were intended to have and had had the direct effect and operation of preventing the States from imposing and collecting income tax. No attack was made upon the Act imposing tax.

The High Court held unanimously that the Grants Act was valid, finding its basis in s.96 of the Constitution, and by a majority of four to three (Dixon C.J., McTiernan, Kitto and Taylor JJ., Williams, Webb and Fullagar JJ. dissenting) held s.221 (1)(a) of the Assessment Act
invalid, in that it was not a provision incidental to the power to make laws with respect to taxation conferred on Parliament by s. 51(ii) of the Constitution.

S.221(1)(a) of the Assessment Act was sought to be justified under s.51(11)\textsuperscript{1} and s.51(xxxix)\textsuperscript{2} of the Constitution, but the Court did not accept it and on this point disapproved\textsuperscript{3} the First Uniform Tax Case. In fact, Dixon C.J. thought it to be a colourable use of the federal power of taxation: "This appears to me to go beyond any true conception of what is incidental to a legislative power and, under colour of recourse to the incidents of a power expressly granted, to attempt to advance or extend the substantive power actually granted to the Commonwealth until it reached into the exercise of the constitutional powers of the States"\textsuperscript{4}.

\textsuperscript{1} The power with respect to taxation.
\textsuperscript{2} The power with respect to matters incidental to the execution of any power vested by the Constitution.
\textsuperscript{3} Taylor J., though agreeing with the majority, was of the view that in the First Uniform Tax Case, supra, that provision was justified as being a temporary measure designed to deal with a special situation, \textit{inter alia}, a war-crisis, but it could not be given a permanent operation so as to be valid in peace-time.
It may be noted that though the plaintiff States disclaimed reliance on any legislative plan, it was still sought to rely upon the purpose disclosed by the planned inter-connection of the Tax Act, the Grants Act and the Assessment Act, namely the purpose of occupying the field of income tax to the exclusion of the States, in considering the validity of the impugned provision. Dixon C.J. appeared to have agreed when he referred to both the nature and history of par. (a) of s.221(1). He said: "No doubt s.221(1)(a) stands or falls as a separate legislative provision but it would be absurd to ignore the place the section takes in the plan for uniform taxation and examine it as if it were appurtenant to nothing and possessed no context".

However, the "absolute" priority given to the Commonwealth by s.221(1)(a) was not essential to the scheme as a whole; the Commonwealth retained its priority in "shortage" situations, such as bankruptcy, and all the other essential features of the Uniform Tax Scheme and the Scheme itself remained and still remain in full operation.

1 Ibid., at p. 614.
Commonwealth-State Co-operation in Other Cases

It has often been found desirable and necessary in Australia to provide for organised marketing of certain primary products in order to keep a balance between demand and supply in those products, nationally and internationally, and thereby sustain the economy of the Commonwealth. Such a measure would obviously require an overall control and regulation of trade and commerce in the commodity and therefore necessitate the formulation of a uniform policy for the Commonwealth. But any such scheme would have to be administered so as not to come into conflict with s.92. By virtue of s.92, any marketing scheme, Commonwealth or State, which interferes with inter-State trade commerce and intercourse would be unconstitutional and therefore inoperative.

Constitutionally a State could provide for an organised marketing scheme, but its operation would be confined within that State, whereas the Commonwealth could control and regulate only the interstate, and the export and import trade in a commodity, and that would not be very effective in achieving the desired aim. Under these circumstances a device was evolved through
the co-operation of the Commonwealth and the States by fully exploiting their respective constitutional powers to achieve a result which could not be achieved by the Commonwealth or the States acting individually. Such a scheme providing for the marketing of hides and leather was considered by the High Court in the Hides and Leather Case. In that case the States acting in co-operation with the Commonwealth agreed upon concerted measures for the control of hide and leather industries in order to carry on the scheme which the Commonwealth alone had operated during the second world war. The purpose of providing the scheme during the war and the necessity for continuing it after the war were in each case "to conserve hides for domestic requirements, keep down the home consumption price and at the same time equalize the returns to the producers or suppliers of hides and distribute the supplies retained in Australia among tanners according to a just proportion"; the overseas price of hides remained very high during the war and

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2 Ibid., at p. 506.
thereafter as compared with the domestic price. According to the scheme, the Federal Act established a Board and provided the machinery for appraisement and for making the payments or distributions to the suppliers, while the State Acts, being complementary to the Federal Act, undertook to vest the hides in the Commonwealth Board with an exception where the hides were already in the course of inter-State trade commerce and intercourse, or required or intended by the owners for such trade commerce or intercourse. Though the plaintiffs challenged certain provisions of the State Act as infringing s.92 of the Constitution, no attack was made as to the provision vesting the hides in the Commonwealth Board. Perhaps the Court might have examined the validity of that provision had the plaintiffs challenged its constitutionality. However, it would not be illegitimate to infer that the vesting of a commodity in a Commonwealth instrumentality by State legislation is constitutional.

1 All the six States adopted uniform legislation. As regards the Federal Territories, the Federal Act contained the like compulsive provisions with respect to them.

2 It was the Hide and Leather Industries Act 1948-49 (N.S.W.) which was referred to in detail.

3 (1952) 85 C.L.R. 488, at pp. 514, 515.
Other examples of Commonwealth-State co-operation to give effective control to a scheme which could not be enforced by the Commonwealth or the States acting individually, are to be found for the regulation of the coal mining industry, and the River Murray Scheme; and the validity of these schemes has not been challenged in the courts. The wheat industry stabilisation scheme is similar to the one involved in the Hides and Leather Case. The Federal Act provided for the establishment of a Board with powers necessary for stabilising the wheat industry, while the State Acts provided for the vesting of the commodity in the Board. It was further provided in the Federal Act that nothing therein contained prevented the Board from exercising any power or function conferred upon it by any State Act. As to the regulation of the coal mining industry in New South Wales, the Federal Act as well as the New South Wales Act made

1 Refer to Comans, Co-operation between Legislatures in a Federation, (1953) 31 Can. B. Rev. 814; Anderson in Essays on the Australian Constitution (Ed. R. Else-Mitchell) at pp. 113, 114.


3 E.g., the Wheat Industry Stabilization Act 1950 (N.S.W.).

4 The Coal Industry Act 1946-58.

5 The Coal Industry Act 1948-57 (N.S.W.).
provision for the establishment of the Joint Coal Board making it responsible for the expansion of coal production in New South Wales, and the Coal Industry Tribunal having power to settle certain industrial disputes. The Acts did not directly authorise the establishment of the Board or the Tribunal, but it was provided that the Commonwealth government might enter into an arrangement with the government of New South Wales for the establishment of those bodies. The River Murray Scheme provided for the economical use of the waters of the River Murray and its tributaries for irrigation and navigation purposes; and in order to reconcile the interests of the Commonwealth and the States of New South Wales, Victoria and South Australia, an agreement was entered into between them and later ratified and approved by the respective parliaments. Under the Acts provision was made for the establishment of a commission charged with the duty of giving effect to the agreement and the Acts concerned in this context.

1 A similar arrangement was later made between the Commonwealth and the State of Tasmania: see the Coal Industry (Tasmania) Act 1949.

2 The River Murray Waters Act 1915-58 (Cwth.), the River Murray Waters Act 1915-58 (N.S.W.).
Conclusion as to Legislative Schemes

From the cases discussed above, it seems the better view that the High Court, unlike the Privy Council, is not prepared to examine the validity of enactments by reference to their joint effect as a legislative scheme unless the enactments are expressly inter-connected, or have a clear interaction so as to raise a very strong presumption to that effect. Otherwise it appears to be somewhat difficult to conceive circumstances in which a scheme would be held invalid even when its existence is patent. There were strong indications in Moran's Case that enactments might be treated together as forming parts of a scheme so that the scheme as a whole either stands or falls, but this approach did not find favour with the High Court as evidenced by the Uniform Tax Cases. In the Second Uniform Tax Case the plaintiff States did not even raise an argument on those lines and took for granted the correctness of the course adopted by the majority in the First Uniform Tax Case. However, the object of the scheme may be looked at, as indicated in the Land Settlement Cases and the Second Uniform Tax Case, in understanding the real purpose of the enactments by
reference to which their validity may be individually ascertained. It is likely that a similar attitude might be taken in the United States\(^1\).

The same attitude was taken in South Africa so far as a legislative scheme was concerned with the "entrenched clauses\(^2\). However, Centlivres C.J. in the Senate Case\(^3\) regarded the object or purpose of the scheme in question as altogether irrelevant. It may be justifiable because firstly South Africa has a unitary constitution, and secondly the scheme was concerned with guaranteed rights of individuals, not merely the distribution of legislative powers.

In Canada, the courts may be more prone to invalidate an Act on the ground based on the existence of a legislative plan than the courts in the United States or Australia\(^4\). This may be due to the double enumeration of legislative powers and the predominance and the frequent application of the rule of "pith and substance".

\(^1\) See supra, at pp. 38, 50-51.
\(^2\) See supra, at pp. 192-203.
\(^3\) [1957(1)] S.A. 552 (A.D.).
\(^4\) See supra, at pp. 78, 79.
However, it is not certain that that ground would by itself be sufficient to invalidate an Act; it would rather be relied upon as an aid to determine the *pith and substance* of the Act.

In Australia, the device of a *legislative scheme* was not merely confined to the sphere of legislative powers; it has also been used to get around the prohibitions of *preference* and *discrimination* and reduce their functional value in the constitutional system. Of course, it is only the validity of the Commonwealth Act that could be questioned as the State Acts do not come within the operation of these prohibitions.

It may also be inferred from the Uniform Tax Cases that the purpose of a legislative scheme, whenever relevant, should be ascertained by reference to formal considerations, even though the Privy Council in Moran's Case referred to *unfairness* or *injustice* and based its conclusions on material considerations. To this extent the Uniform Tax Cases are a vindication of Evatt J.'s views.

As regards legislative schemes in pursuance of an agreement between the Commonwealth and the States, it has
become rather a matter of construction. If an Act operates by reference to an agreement, its operation would then be conditional upon the agreement being valid. But if it made no reference to the agreement, though incorporating the terms of the agreement, any reference to the agreement would be irrelevant. Thus by following the latter course, the operation of a legislative scheme could be assured even if the agreement by itself might not be valid, provided the legislatures individually have acted within the ambit of their legislative powers respectively.

In *Magennis* Case it was admitted that the State legislation was within the constitutional power of the State but it became inoperative because the agreement referred to in the legislation turned out to be invalid. It is true that even if a statute is constitutional, it need not be operative. There is the further question - is its operation dependent on a condition? There is no reason why a statute should not provide for its operation to be conditional upon an uncertain event which may never happen, and this could include the event of ascertaining the validity or invalidity of an agreement; or a statute could be expressed as intended to operate only if a
specified Commonwealth statute is valid. The objection is to interpreting a statute in this way when plainly its operation was not so conditioned.

In Canada, though inter-delegation between Dominion and provinces was not permitted, delegation to an agent of a legislature or its instrumentality has been upheld as valid by the Supreme Court\(^1\). Could the same be also said in Australia? In the Australian Constitution, s.51(\(xxxviii\)) provides that at the request or with the concurrence of Parliaments of all the States directly concerned, the Commonwealth Parliament may make laws with respect to a matter falling within the jurisdiction of the States, but so that the laws shall extend only to States by whose Parliaments the matter is referred. Accordingly, as there is provision of reference only by States to the Commonwealth, it may be presumed that the reverse process, i.e., reference by the Commonwealth of any matter within its jurisdiction to the States, was not contemplated under the Constitution. If it is so, then a reference or delegation by the Commonwealth to the States would not be constitutional. Does it follow that any reference or delegation by the Commonwealth to a

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\(^1\) See supra, at pp. 84-88.
State instrumentality would also not be constitutional? It is not beyond doubt as the reference or delegation in both cases could ultimately achieve the same consequences. However, the matter has not been tested and Australian governments generally have acted on the assumption that delegations by Commonwealth to State, and by State to Commonwealth instrumentality are constitutional. The frequency of the practice and the absence of challenge suggest that such devices would be beyond the operation of our maxim.
PART FOUR

Logical Status, Meaning and Force of Our Maxim
CHAPTER XIII

Logical Status of our Maxim

Our maxim, like any other legal principle, may involve the study of two entirely separate areas posing distinct and distinctive types of problems. One is in terms of 'description' dealing with facts and consequences. The other is in terms of 'attitudes' dealing with the specific role played by value judgments. The two areas are not completely unrelated, but a reference to both of them separately does provide a basis for the proper understanding of a legal principle.¹

Descriptive analysis may appeal more to a lawyer with a practical approach than the analysis based on value judgments, but the importance of the latter should not be underestimated. Many of the controversial problems that confront the courts are marginal cases and they may often be understood properly only in the light of conflicts between arguments based on value judgments.

which are logically deduced not only from a system of moral or social relations but also from the realm of political ideologies; this is particularly so in the field of constitutional law. There is a hierarchy of values which so far as accepted is a guide to the solution of a problem.

However, value judgments are the intellectual tools to be used for the purpose of persuasion and play a secondary role as an aid in arriving at a decision. Moreover, their usefulness is most fully appreciated in the sphere of unenacted law where issues involving concepts which have ethical or emotive content become predominant. For example, in the law of torts which is not yet codified in the common-law countries, words such as 'good', 'wicked', 'harm', 'duty' and many others, and generalisations, classifications or categories based on them could properly be understood only by reference to values relating to a system of moral or social relations. On the other hand, in the sphere of written or enacted law there tends to be a reasonably determinate set of legal principles which provide a basis for the making of a decision and the necessity of resorting to value judgments may not be so frequent. Thus for
the purposes of our maxim in the area of written constitutions it is the descriptive analysis that is more fruitful than the analysis based on value judgments. Hence, in the present study emphasis is put on the analysis of facts and situations and the approach is rather analytical than evaluative.

II

The desirability of codification was felt long ago in order to avoid uncertainty of the unwritten law which might be susceptible to different interpretations resulting in unnecessary litigation and, therefore, much vexation and trouble\(^1\). However, no code could possibly be concise or exact in words due to the very nature of the human language which is full of ambiguities and obscurities\(^2\). Thus there has been an endeavour to understand the meaning of law reduced to writing and make sense out of it, and this process came to be known as interpretation (or construction). In Roman law the term *interpretatio* corresponded to interpretation (and/or


construction) and Roman jurists used it in the widest possible sense so that a very large part of the law was formed by a gradual extension of the provisions of the Twelve Tables. Its influence was then seen in the discussions upon the French Code, and also in the Early English law\(^1\). Modern Practice on the Continent is to treat statutes as the basis of the law, and the task of the courts is to "fill gaps" by arguments based on travaux préparatoires\(^2\) and analogy\(^3\) (as the last resort) so extending the basis for logical inference of legislative intention. However, the English approach tends to be concerned more with the verbal expression of the statute\(^4\).

A law or legal rule must not be violated. But the question arises how the violation occurs. The simplest way is conduct which "obviously" or "on its face" amounts to disobedience of the law or legal rule. However, it

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1 See Lieber, *loc. cit.*, at pp. 260-64.
3 See Lieber, *loc. cit.*, at p. 275 et seq.
may also occur if something prohibited is done under the guise or pretence of observance, and it would be the duty of courts not to allow this, otherwise the law or legal rule would become illusory. "There can be", said Lieber, "no sound interpretation without good faith and common sense";¹ and the harmony produced by good faith and common sense, Dr Hammond commented, would "be decisive for or against a proposed interpretation, even though all the rules that may be formulated array themselves on the opposite side"². Thus observance of good faith has been regarded as a cardinal principle of interpretation.

It is true that good faith is a notion which cannot be reduced to any formal rules, but it may broadly be stated that before any opinion is formed as to the violation of a law or legal rule one should look into its substance and not merely its form. This approach has received various specialised applications. For example, when the theory of the *equity of the statute*³ was

employed to mitigate the hardships flowing from rigid adherence to the letter of the law, Plowden (the greatest advocate of the theory) explained its application in terms which criticised reliance upon the form of the law and advocated adherence to its substance.

Similarly, Heydon's Case lays down that before having a look at the words of a statute one should discover "the true reason of the remedy" and give the words under interpretation the meaning "as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, for to add force and life to the cure and remedy, according to the true intent of the Act, pro bono publico". Here "the true reason of the remedy" is the purpose or policy for which the law was provided, and it is but one of the ways of looking into the substance of the law.

It has long been usual for English judges to examine the intention of a statute in order to find a clue to its


interpretation\(^1\). In the Middle Ages, judges, as members of the King's Council, were generally themselves legislators and had little difficulty in deciding what the real 'subjective' intention of the statute was\(^2\). However, after the judges had separated from the Council, the intention was to be inferred from the words of the legislative text. Attempts were made to devise rules as a guide to interpretation but their application was somewhat arbitrary. The reason was that most statutes before the 19th century laid down no more than broad general principles. It was during this period that the English Common Law was transplanted into the United States - the first federation to develop rules of constitutional interpretation. Thereafter, though the trend in England was towards detailed statutes to which the courts applied literal interpretation, the courts in the United States were inclined to continue with the old, broader approach. For example, in England the theory of the 'equity of the statute' fell into oblivion but the courts in the United States had not ceased to make use of the theory as furnishing a guide to interpretation\(^3\).

2 Plucknett, *Statutes and their Interpretation in the Fourteenth Century* (1922), at p. 49.
3 See Lenhoff, *loc. cit.*, at p. 950.
Our maxim can operate in any field of private or of public law, being in the broadest sense merely an application of principles of *good faith*. However, we are concerned more particularly with its application in public law, because here the maxim has a more precise significance and its possible application is most easily tested or illustrated.

III

In order to have a proper appraisal of the constitutional government of a state, whether it be federal or unitary, it is not merely the Constitution but also its working that forms the basis of our study. The role played by courts makes a significant contribution to the shaping of governmental machinery, especially in a federation where courts have the power to review the acts of legislatures. However, the practice in courts is, in itself, guided by a set of rules of interpretation whenever a conflict involving constitutional principles arises before them. It may be that some of the rules are less important or more controversial than the others, but certain rules such as our maxim are so fundamental

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See Wheare, *Federal Government* (2d ed.), at pp. 21-22.
that they form the very basis of judicial practice.

A constitution requires the relative permanence of the specified governmental machinery and correspondingly guarantees the relative security of the subjects; while necessarily having a good deal of flexibility, the constitution needs to be protected from abuse of powers conferred on a legislature, and from arbitrary changes in law. A constitution, therefore, of any value, presupposes the existence of our maxim without which its provisions would be meaningless. In other words, something like our maxim necessarily accompanies any attempt at expressing the notion of a limited governmental power, because without some such notion the attempt at express statement of a limited power would, except in the very simplest and narrowest circumstances, be a waste of time.

Thus limitations upon a legislative power are not only those which are expressly provided in the constitution but also those which, though implied, are necessarily to check any abusive or arbitrary exercise of the power. "The mere grant of a constitution", observed Cooley, "does not make the government a constitutional government, until the monarch is deprived of power to set it aside at will".1

Our maxim, therefore, operates as a limitation for holding laws unconstitutional on the ground that the legislature has, under the guise or pretence of doing something lawful, assumed power (or acted in a manner) not authorised by the constitution or acted not in good faith. It is so even if the maxim has no legal force in the sense of not being recognised as part of positive law.

It would seem, then, to follow that our maxim is part of the body of logical principles whose existence is presupposed by any system of law. Such principles are often in the English system treated simply as part of the Common Law - especially if, as in the case of our maxim, we can trace repeated statements of the principle back through decisions and other authoritative texts. This incorporation of "general logical (and moral) principles into the body of the Common Law has made it less necessary for English lawyers to concern themselves with 'natural law', 'extra-positive law' and other such notions; what the Continental civilians find in such meta-legal concepts may be for English lawyers simply a part of their positive law system. However, even within the Common Law, it is possible to distinguish between principles which are general guides to legal administration
and have a 'meta-legal' quality, and those having a more 'positive' character, by the following test: how do we regard cases in which the principle in question might have been applied but has not been applied? Do we tend to say "therefore the principle has been overruled and is no longer part of the law", or do we tend to say "the principle remains and no particular example of its not being applied can remove it"? From the examples given in this thesis, it seems probable that our maxim belongs to the latter class. It may be regarded as in a strict sense part of the Common Law, but if so, it is a part which also belongs to the general body of logical principles associated with any systematic and reasonably consistently enforced body of law.

IV

Suppose our maxim is formally recognised by express mention in the constitution. Would it make any difference in the attitude of courts to the constitutionality of legislative acts? In its unexpressed form it might be considered as a rule of interpretation of a subsidiary character - a rule of guidance not for legislatures but for courts. It would, therefore, be used as the last resort so that the constitution may not lose its identity.
But as an express provision in the constitution its function might become primary in character. In other words, it might have a more positive force; legislatures as well as courts would be obliged to obey it. Courts would treat it not merely as a rule of interpretation but as a part of the Constitution like any of its other provisions which are in themselves subject to interpretation. However, its effectiveness would be determined finally by courts as the process of interpretation seeks ultimately a determinate between a minimum and maximum extension. It is likely that a strict interpretation of the maxim (as forming part of the constitution) might overlap with its operation as merely a rule of constitutional interpretation; but when a strict interpretation is to be applied and when it is not is likely to depend on general historical factors, not on particular maxims whether expressed or implied. One can imagine the maxim in express form having no more significance than it has in its present position as 'unwritten' or 'extra-positive' law. More probably, however, an express provision would encourage courts to a stricter or more frequent application. For example, if the maxim were in the Australian Constitution, possibly there would have
been no dissents in Barger's Case\(^1\), possibly Moran's Case\(^2\) would have been decided the other way, but possibly the Uniform Tax Cases\(^3\) would not have been affected.

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CHAPTER XIV

Meaning of our Maxim

The maxim itself contains a number of ambiguous terms, or terms having blurred edges. By the time these are analysed and their permutations and combinations taken into account, the resulting variation in meaning is sufficient in itself to explain the apparent conflicts between decisions. A linguistic philosopher could probably take this type of analysis very far, and the following discussion is pitched only at the "common sense" level. Let us take the main terms of the maxim seriatim.

"What"

This is the subject of our maxim and in our context it refers to some legal act which has to be characterised. In a constitutional setting, "what" must be expanded into a legally significant act, done pursuant to a constitution which contains positive statements laying down propositions as to acts or forbearances, the act being approved or disapproved as being consistent or
inconsistent with those propositions.

However, some vagueness or ambiguity always exists as to the meaning of words or phrases and to that extent there is likely to be a certain amount of indeterminacy in testing the validity of statutes. To deal with this openendedness courts have resorted to supra-constitutional principles and sought guidance in common law or natural law or some such concepts. A practical business sense was once taken into account in finding a bill ultra vires. So is the test of policy or expediency often resorted to under the United States Constitution.

These concepts are related to the ideas of the community or public opinion reflecting social, economic or political ideologies which undergo a change with the times. Accordingly the meaning of words and phrases which are to be understood by reference to those concepts also undergo a change. Thus no interpretation could be decisive for all times and the constitutionality

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of a law would depend upon the ideas or ideologies prevailing in a community at a particular time.

Thus the characterisation of "what" assumes that a certain meaning can be given to constitutional provisions, and characterisation oscillates between wide and narrow interpretations depending upon the judicial attitude which, in turn, is influenced by 'extra-positive' concepts. For example, our maxim has more opportunities of its application in the United States and Australia when the Constitution is given a restrictive interpretation based on the concept of 'dual sovereignty' than when the Constitution is given an expansive interpretation based on the concept of 'plenary' powers. If a case in which the maxim has found its application has been overruled, it does not necessarily mean that the maxim has fallen into disuse or become redundant; it may only signify a change or shift in the meaning of a provision or rule whose construction is a pre-requisite in the application of the maxim.

1 See Levy, An Introduction to Legal Reasoning (1950), at pp. 41-72. Also refer to Justice Holmes in Lochner v. New York (1905) 198 U.S. 45, at pp. 75, 76.

On a simple assumption that legal acts are either commanded or prohibited this would raise no difficulty, but in fact as Hohfeld's tables show the range of legal categories is much wider, and probably even Hohfeld over-simplified the position. In practice, legal norms may be said to exhibit a continuous range of "attitudes" towards given conduct, from outright prohibition at one end to specific command at the other, with positions in between at which one may speak of the norm having a "flavour of disapproval" or being "neutral". In constitutional contexts, there are two distinctions of practical importance; there may be a constitutional prohibition, or there may be an area of power not granted to the authority in question. In the ultra vires situation, where no specific prohibition is concerned, the judicial attitude may be affected by the answer to the question - what happens in the area of power not intra vires the authority in question. Is it within the power of no authority (when the position may be considered as approximating that of a prohibition, with an inference that no law should touch that area at all), or is it within the competence of another legislature in the
system? If the latter, is it expressly so (a multi-list system), or residually so (as with the Australian States)? Where there is a division between several legislatures, it may also be important to consider general judicial assumptions concerning the balance of the system: do the judges try to hold a balance, or have they an assumption in favour of one authority or the other? All these distinctions can affect the significance to be given the term "cannot".

"Be done"

The word "done" is not especially suited to legal contexts; it is more typical of non-legal language where it refers to a complex real-life situation. In ordinary language, no one would think of denying that what the Acts in the Uniform Tax Cases\(^1\) in Australia "did" was to expel the States from the income-tax field. Courts, however, usually restrict their view of what a law "does" to a relatively narrow range of consequences of the law. They may even take a purely Kelsenian view and regard the "doing" as the norm and nothing else, so that any social, economic or political consequences are irrelevant. In

\(^1\) South Australia v. Commonwealth (1942) 65 C.L.R. 373; Victoria v. Commonwealth (1958) 99 C.L.R. 575.
practice, their view is rarely as narrow as that, even if their language might suggest it. The difficulties arising from this overlap with those arising from the expressions "directly" and "indirectly".

"Directly"

This requires the characterisation of some legal act which is in conformity with the provisions of a constitution. But how can one say that an act conforms to something that is commanded or prohibited? Mere intuition or even commonsense would not appeal to anyone as a criterion, even though in some cases these might appear to be the only possible explanation. Practical considerations in terms of social, economic or political consequences may possibly supply an answer, but there would always be the difficulty of reconciling conflicting opinions; moreover, as noticed earlier, courts apparently do not profess to accept it. Expressions such as 'pith and substance' or 'true nature and character' have also been coined but they have not met with much success especially in a borderline case which presents the problem of characterisation in a difficult form. However, one thing appears to be certain and that is that the Kelsenian method in confining our attention to a formal hierarchy
of norms would not suffice, and a reference may have to
be made to the setting or context of a legal act in
order to characterise an "achievement" as "direct". This
problem is discussed further under "indirectly".

"Cannot be done"

This has been discussed above in parts as "Cannot" and "Be done", but it may be noted that in this part of
our maxim this expression need not have the same meaning
as in the earlier part, because of the following word
"indirectly". What one regards as "doing" something can
be coloured by the following adverb.

"Indirectly"

This denotes a characterisation of some legal act
which is not in conformity with the provisions of a
constitution. "Directly" and "indirectly" may to a
certain extent involve similar problems of characterisa-
tion as what is "directly" is not "indirectly" and what
is "indirectly" is not "directly". However, "indirectly"
is not exactly the opposite of "directly", because
"indirectness" is not simple straightforward "invalida-
tion" but arises under some guise or pretext or pretence
of doing something that gives, on the face of it, the
appearance of "validation". Thus "indirectly" raises characterisation difficulties in a new form.

The problem of "indirectness" may arise when a piece of legislation actually operates in two or more classes of subjects and it is often treated by courts as a problem of attributing a single classification, assuming that the legislation either belongs to a class, or it does not. To attribute one characterisation to a law involves the ascertainment, in some way, of the line of demarcation between the legislative powers of several sets of governments, or between the legislative powers and the prohibitions imposed upon them. However, it is by no means an easy task to decide whether a particular enactment belongs to a certain class which the Constitution has specified for that enactment's validity or invalidity.

In Barger's Case, it was thought by the majority that the Act in question could only be passed by the State legislature; it meant that the Commonwealth Parliament was not competent to do so. This opinion rested on the assumption that the purpose (as distinguished from

1 R. v. Barger (1908) 6 C.L.R. 41.
motive) of the Act was regulation of the conditions of labour and not taxation. However, the distinction between purpose and motive, it must be conceded, is easier in theory than it may become in practice.

In an article in the Virginia Law Review, Mr G.W.C. Ross followed a different approach; he said that it was futile to say that a law belonged "really" or "primarily" to one "field" and only "secondarily" to the other: what it "really" did was to deal with each field in relation to the other. To take his example, suppose the Constitution (of Australia) authorised the federal Parliament to legislate "with respect to parks"; the State legislatures have the field of "dogs", nothing being said in the Constitution about dogs. Is it constitutional for the Parliament to enact a law which forbids taking dogs into parks? In other words, is such a law with respect to "parks", or with respect to "dogs"? Mr Ross characterised it as dealing with "dogs" in relation to "parks". But why not characterise it as dealing with "parks" in relation to "dogs"? Perhaps Mr Ross may be right but why it was so was not explained. Suppose a law

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forbids the entry into parks of all persons accompanied by dogs. Is it a law with respect to "parks", or "persons", or "dogs"? Mr Ross's formula does not, therefore, solve the problem.

Professor Sawer explained the problem in the Australian context thus:

The cases that reach the higher Courts are almost by definition marginal cases. Sometimes they can be solved by reference to the ordinary usage of language, or the customary nomenclature found in British, Dominion and U.S. legislation, and constitutional documents. Frequently the Court is compelled to act on an 'intuitive' appreciation of the primary 'object' of the law, when its essentially political judgment has to be wrapped up in such question-begging phrases as 'pith and substance', or 'true nature', phrases depending on a fallacious identification of fluid man-made norms with immutable Aristotelian natural types or Platonic ideal forms. As decisions multiply, types are established which provide precedents for future guidance. Of course, this kind of quasi-legislation is not peculiar to the field of constitutional law. But it is in that field that the official myth of mechanical 'application' of the law by the judges is most strongly maintained, while the political importance of the question makes a critical examination of the actual situation a particularly delicate operation.1

II

The above discussion suggests that the main

difficulty with understanding and applying the maxim arises from the words "directly" and "indirectly" which we will now consider in more detail.

In the public law field, the maxim becomes relevant only in relation to a governmental authority whose competence is in some degree limited. A unitary sovereign in the Diceyan sense of sovereignty could not be affected by the maxim. The maxim then assumes the following circumstance: a governmental authority which has power to "do" something "directly", but which might also (but for the restraining effect of the maxim) employ these powers so as to "do" other things in a way which would ordinarily be described as "indirect". But this formulation involves some vague and even question-begging expressions and it is desirable to attempt a more precise analysis.

A. Let us assume that governmental powers and limitations on such powers are defined only by reference to purposes. Our governmental authority is authorised to achieve purposes A-Q. As to purposes R-Z, there are two possibilities:

(a) The authority is expressly prohibited from achieving purposes R-Z. This should be the
simplest case, since a literal application of the constitutional restriction will necessarily invalidate any action tending to achieve the prohibited purposes. A conflict between the authorisation to achieve A-Q, and the prohibition against achieving R-Z, can occur because probably particular measures adopted by the authority may tend to achieve both B (within power) and S (prohibited). Unless the constitutional document provided some rule for solving such conflicts, the courts would be faced with a task of constructive interpretation so as to provide a solution. Such a solution need not be simple or all-embracing; it may sometimes give priority to the power to achieve B, or sometimes give priority to the prohibition against achieving S.

Our maxim may be cited in such contexts, because an attempt will probably be made to argue that achieving B is the "indirect" or "incidental" matter, while achieving S is the thing which may not be achieved "directly". 
Strictly, however, our maxim has no relevance, because we are assuming that purposes B and S are both directly achieved by the measure in question, and the problem is, therefore, simply one of interpreting the constitutional document to see whether the purpose S may never be achieved under any circumstances whatsoever, or is simply something that may not be achieved in isolation.

(b) Nothing is said about purposes R-Z. Then to achieve those purposes is simply ultra vires, and a measure tending solely to achieve S would be invalid. What of a measure tending to achieve both B and S? Logically, this is no different to the situation in (a) above; it should be a question of ascertaining by interpretation whether the constitutional document intends to empower only achieving A-Q when unmixed with any R-Z's, or extends to achieving anything in which there is an A-Q. Hence once again there is no need for our maxim.
B. Actually governmental powers and limitations on them are not always defined by reference to achieving a purpose, and even where they are difficulties can arise over differences between "direct" and "indirect" purposes, or between "immediate" and "ultimate" purposes, or between "legal" and "social" purposes, etc. Thus a power may be given by reference to a class of transaction which is to be "regulated", with an inference that the purpose of the regulation is irrelevant, and with an assumption that the class may be recognised by attributes or grounds of characterisation having no connection with purpose. Or if distinctions are drawn between purposes, then those distinctions must themselves be non-purposive if the definition is not to be circular or productive of an infinite regress.

These non-purposive definitions of power and limitation on power may further be sub-divided into many characterisation types, but for our discussion it is sufficient to treat all non-purpose types together. Our governmental authority then is authorised to deal with non-purposive circumstances a-q. As to non-purposive

\[1\] E.g., see Dixon J.'s classification in Stenhouse v. Coleman (1944) 69 C.L.R. 457, at p. 471.
circumstances r-z, the same two possibilities exist as those considered under A above, and theoretically there is again no need for our maxim. It is a matter for specific constitutional provision, or failing it for constructive interpretation, to decide whether the presence of characteristic b validates a measure, notwithstanding the concurrent presence of characteristic s whose presence is either prohibited or is in isolation insufficient to validate.

C. Now let us assume a case where some powers are defined by reference to purpose and others by reference to non-purpose characteristics, these being respectively A-Q, and a-q; similarly the residue of possible powers and circumstances are purposive R-Z, and/or non-purposive r-z. Then there are the following possibilities:

(a) There is a prohibition against achieving purposes R-Z. The possible clash between this and the power as to A-Q has been dealt with above. But what of a transaction dealing with non-purpose matter b, when the transaction also tends to achieve purpose s? The same considerations apply. Either the constitutional document or constructive
interpretation must decide whether characterisation as b or achieving S is to be regarded as the dominant consideration. Our maxim has no logical place.

(b) There is a prohibition against dealing with non-purpose matters r-z. The case which is not yet dealt with is where a transaction having characterisation s tends to achieve B. Again the solution is provided by the considerations which have been discussed above.

The above discussion suggests that if the "primary" or "direct" characterisation attributes of an exercise of power include both attributes indicating validity and attributes indicating invalidity, the solution of the resulting conflict does not require our maxim or anything resembling it. This conclusion might have been reached from the maxim itself, since the maxim requires a circumstance which can be described as the "indirect" achieving of a prohibited matter or a matter otherwise beyond power, whereas the circumstances examined in A, B, and C above involved no "indirections". To take a convenient Australian illustration, we
assumed in those cases that the tax was imposed for a genuine purpose of raising revenue, and for a concurrent genuine purpose of discouraging an activity, e.g., sale of motor vehicles, which so far as intra-State was not otherwise within an area of Commonwealth power, and that so far as characterisation types are concerned, the law from its contents and legal operation would be classified both as a taxation law and as a law regulating the sale of motor vehicles. If in addition the law burdened sale as such, an essential feature of trade, then it would come within the prohibition of s.92 and beyond question under the present Australian law, that prohibition would be given primacy. But throughout our assumption is that these attributes are actually present.

How then can there be any room for considerations of "indirectness"? The first possible answer is that the maxim assumes for every law one exclusive or predominant characterisation attribute, and any other attributes actually present are then to be classified as "indirect", even though those attributes are actually present and no question of malafides or "disguises" is involved. This principle would amount to a dogmatic direction to the courts that they must attribute one and only one
characterisation attribute to a law, and its validity or invalidity will then follow as a matter of course in accordance with the constitutional distribution of power and the constitutional prohibitions. Our maxim would then merely explain to those puzzled by the decisions of the courts why the genuine though (as found) subordinate existence of a characteristic making for validity was disregarded. An attempt to apply such an approach might be represented as requiring the discovery of "primary" as against "subsidiary", or "principal" as against "incident", or "essence" as against "accident", or "purpose" as against "motive", etc., of a measure. Our maxim could then be rephrased thus: "Characterisation of a legal act is determined by reference to a feature characterised as primary, principal, essential, etc.; if that feature does not attract validity then the act will not be validated by the presence of a feature characterised as subsidiary, incidental, accidental, etc., even though when considered alone that feature would attract validity."

Thus the difficulty may not be to distinguish the "direct" from the "indirect", but to distinguish the "direct" from the "less direct". For example, in
Barger's Case, the regulation of the wages of employees was regarded as the "direct" achievement and the imposition and remission of an excise duty as the "less direct". If our maxim is applied, then the legislation failed because the former achievement was considered by the Court as the "purpose" of the Act in question, it being virtually prohibited on account of the then attitude to the "reserved" powers of the States. But in Osborne's Case, should we say that the maxim was not applied, or simply that the breaking up of large estates was not even an "indirect" achievement? Probably the latter. The courts put a limit on the purposes or consequences or other attributes of legislation which they will regard as legally relevant at all, whether "directly" or "indirectly", but where they draw this line varies from system to system and even from court to court within a system.

One may often suspect in constitutional contexts that if a court relies on such an approach, it has actually come to the conclusion that there is bad faith - the inclusion of the incidental validating material is a

1 R. v. Barger (1908) 6 C.L.R. 41.
2 Osborne v. Commonwealth (1911) 12 C.L.R. 321.
mere blind. That, however, is not necessarily the case. The incidental factor may be quite genuine and necessary to the legislative plan. If bad faith is excluded, then there is the obvious difficulty of deciding which feature of a complex legal act, such as a statute, is to be regarded as "primary", "principal", etc., and which as "secondary", "incident", etc. Evidence from the legislative process, if admissible, might help to solve such problems, but often it is not admissible and often it is not helpful. Thus we usually come back by yet another route to the fundamental problem of characterisation.

The next possible answer is that the maxim does not relate to circumstances where mixed characterisation attributes are objectively or genuinely present, but is concerned in some way with "mala fides" or "disguises". If the measure on its face has characterisation attributes A-Q, or a-q, making for its validity, but a court is able to establish by some process of inquiry that these attributes are falsely asserted, and the attributes of the measure are actually and exclusively within R-Z, or r-z, then the measure may be held invalid. The "indirection" is in the dressing up. Our maxim might then be rephrased: "Measures will be judged by the attributes
they actually possess, not by those which are falsely attributed to them".

The difficulty of applying conceptions such as mala fides varies with the kind of governmental authority concerned. It is relatively simple to apply the distinction between "genuine" and "fraudulent", or "bona fide" and "mala fide" in private law and many administrative law contexts, but relatively difficult in constitutional contexts because in the systems with which we are concerned, the Courts will not readily attribute "fraud" or "mala fides" to Parliaments, Monarchs, Presidents, etc., nor will they readily scrutinise the evidence (parliamentary debates, etc.) on which such findings might be based.

Suppose that in a constitutional context, a court will not allow allegations of bad faith against a parliament and rejects any identification of "directness" or "indirectness" with distinction between "principal" and "incident" etc. If a statute is with respect to topics A and Q, then the court regards it as a statute dealing with both matters and does not inquire in what degree it affects them; Q may be a relatively unimportant feature on some standard of importance, but the court still says it is nevertheless a statute touching Q and
this must be considered for deciding on validity. Suppose the legislature in question has powers with respect to topics A-P, but topics Q-Z are not within its power. The system would then, it appears, gain no help from our maxim. It would, however, require some rule to solve the problem. The rule might be that the presence of an ultra vires factor invalidates all, or the presence of an intra vires factor validates all, or distinctions might be drawn between cases where Q-Z are prohibited, or are committed to another legislature in the system, or are higher or lower in some hierarchy of judicial values. We have seen that in the case of Canada, the "double aspect" rule used to solve some cases of this kind results in the creation of concurrent powers, although the system seemed designed to avoid any such powers.
CHAPTER XV

Force of our Maxim

The force of our maxim depends on a large number of variants, from the personal outlook of individual judges to the terms in which powers and prohibitions are framed, and its force is also likely to vary greatly as between different branches of public law. For the purpose of present discussion, it is proposed to deal with the seventy-four constitutional cases mentioned in some detail above, which also show whether the maxim was applied or not applied. These are cases in which the maxim or a principle similar to it was argued or could reasonably have been applied - where it was in some form or another an important issue. It is very rarely that such an issue can be isolated as the only or the decisive one, so that in "weighing" these cases for the present purpose there is inevitably a subjective element. It is not a matter to which any simple statistical method could be applied. Nevertheless this listing does suggest some general propositions about the relative force of our maxim.

See Appendix.
This restriction of the field of constitutional cases is justified partly by the necessity for having a manageable sample, and partly because the constitutional cases present the special problem previously mentioned - namely the limited application in such a context of notions of bad faith. Courts may often have their suspicions about the good faith of a legislature but they are usually unwilling to express any such suspicion and make it an overt ground of decision; they are much more likely to try to bring the case under the categories of "directness" and "indirectness" - the "substantial" and "true nature and character" approach. If we find that even with such limits on the application of the maxim, it has been given effect to in a considerable proportion of cases, then we may conclude that its force is appreciable.

Out of the seventy-four cases listed, it was in forty-eight cases\(^1\) that the legislation in question was.

\(^1\) See Appendix. It may be noted that our maxim presupposes that there will be no difficulty of \textit{locus standi} to challenge the validity of legislation; where a case is decided on the ground of "lack of \textit{locus standi}"; the Court does not dispose of the substantive issue, so the above list does not include such cases as \textit{Anderson v. Commonwealth} (1932) 47 C.L.R. 50; \textit{Massachusetts v. Mellon} (1923) 262 U.S. 447. On a broader view, such cases could be included as examples of the failure of the maxim.
held invalid. There have been occasional cases where one might think our maxim ought to have been applied and was not\(^1\); or ought not to have been applied and was\(^2\); such cases are likely to occur as beyond a certain stage it becomes a matter of opinion, but we can assume that "erroneous decisions" more or less balance out. These figures suggest that the maxim has been able to play a considerable part in exercising restraint on legislatures with limited powers.

Let us now concentrate on the forty-eight holdings of invalidity and distinguish between "prohibition" situations, where there is an express constitutional prohibition, and "ultra vires" situations, where there is no express prohibition but only an alleged lack of affirmative power.

Thirteen cases\(^3\) in which the legislation was held

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\(^3\) See Appendix.
invalid deal with "prohibition" situations. The prohibitions, here concerned, are s.92 and s.116 of the Australian Constitution. Basically the problem is to distinguish "direct" from "indirect" characteristics of a law. However, in the case of s.92, it has assumed a specialised form: our maxim would apply if (i) a law under the guise of dealing with "accidents" or "incidents" of inter-state trade, etc., or something which is not inter-state trade, etc., imposes a real or substantial restriction or burden or liability on the "essence" of inter-state trade, etc. (the expression "trade, commerce and intercourse" is given a restrictive meaning so as not to include anything incidental or ancillary to it), and some "closer connection" must appear between the activity or transaction affected and inter-state trade, etc., than the economic interdependence of inter-state trade, etc., and domestic trade and commerce of a State; (ii) a law discriminates against inter-state trade, etc., as compared with intra-state; (iii) a legislature under the guise of removing legal remedies, validates its own Acts which are otherwise invalid, or validates administrative acts done in pursuance of such invalid Acts. As to s.116, our maxim would apply if a law is an attempt in disguise to deal with something that is prohibited by that section;
it involves problems of characterisation similar to those arising in the \textit{ultra vires} situation as the prohibition is defined by reference to purpose - as if a legislature is denied the power to legislate \textit{with respect to} the subject-matter of the prohibition.

In the area of "\textit{ultra vires}" situations, twelve cases\textsuperscript{1} arose under the Canadian Constitution. The Canadian Constitution provides two separate lists of legislative powers for the Dominion Parliament and the provincial legislatures, and each list is exclusive of the other. In actual working, the listing of a subject-matter as within the jurisdiction of the Dominion Parliament has virtually been considered to operate as a prohibition on the powers of the provincial legislatures, and vice versa. Hence, the application of tests like "pith and substance" or "true nature and character" becomes inevitable in order to distinguish between "direct" and "indirect" characteristics of a law, and the Canadian examples can therefore be regarded as transitional from the "prohibition" to the "\textit{ultra vires}" situation.

Ten \textit{ultra vires} non-Canadian cases\textsuperscript{2} in which the

\textsuperscript{1} See Appendix.
\textsuperscript{2} See Appendix.
legislation was held invalid deal with powers defined by reference to purpose. These cases are concerned mainly with the defence and appropriation powers in Australia and the appropriation power in the United States. A specific purpose is a circumstance which provides a ready base by reference to which "direct" characteristics of a law may be distinguished from the "indirect" ones. Thus our maxim is more readily accessible in case of a power defined by reference to purpose than in case of a non-purposive power.

Twelve *ultra vires* non-Canadian cases\(^1\) in which the legislation was held invalid deal with powers defined by reference to non-purposive classifications. However, while it is true that these powers are not on their face purposive, purpose limitations may easily be read into them. For example, our maxim might apply if a tax imposed is of a confiscatory nature, or highly exorbitant, or with the purpose of penalising some conduct, even if the taxing power is not framed in purposive language. More difficult is the case where a tax imposed is accompanied by an exemption from its payment if certain

\(^{1}\) See Appendix. Commonwealth Oil Refineries v. South Australia (1926) 38 C.L.R. 408, belongs to both the "prohibition" and the "*ultra vires*" situations.
conditions or requirements are fulfilled; in such a case the distinction between "direct" and "indirect" charac-
teristics becomes more vague and undefinable. "Indirection" may also arise in the framing of a law, e.g., imposition of an excise duty under the guise of a tax imposed on sale.

There are two more cases, Cowburn's Case and Magennis Case, in which the legislation was held invalid, but these may be regarded as not properly belonging to either the "prohibition" or the "ultra vires" situations. Cowburn's Case is an example of a somewhat rhetorical reference to our maxim, rather than application of it. Magennis Case may, on one view, seem to belong to the "ultra vires" situation as the main issue involved in that case was the validity of the Commonwealth Act which was held invalid for not satisfying the requirements of s.51(xxi). But there may also be the possible view that the Act was invalid for not providing "just" compensation, a prohibition similar to the one developed in the United States, and it may therefore be said to belong to the "prohibition" situation. However, the former view appears to have more appeal in the Australian context because the

1 Clyde Engineering Co. v. Cowburn (1926) 37 C.L.R. 466.
2 P.J. Magennis Pty Ltd v. Commonwealth (1949) 80 C.L.R. 382.
the conditions laid down in s.51(xxxi) have been treated as part of the definition of the power. It may be pointed out that out of ten cases involving legislative schemes it was in two cases that the legislation was held invalid, and one of these came from Canada. This may lead to a conclusion that our maxim has little force in the area of legislative schemes. However, to conclude that way is to over-simplify the matter. Our maxim presupposes a certain basic approach to the relevancy or desirability of purpose in different situations. Courts in general have not entertained the idea of examining legislative schemes by reference to their purpose or object (apart from the question of formal or material considerations), unless the Acts comprising a scheme are inter-connected, or have a clear inter-action so as to raise a strong presumption to that effect. This relegation of purpose has accordingly restricted the application of our maxim in this area.

1 Nelungaloo v. Commonwealth [1951] A.C. 34. This was for the purpose of deciding whether "just terms" issues raise inter se questions under s.74 of the Constitution.

2 See Appendix.

In a federal constitution having only one list of legislative powers (as in the United States and Australia) it is easier to permit the legislature with express powers to range over subjects which touch the permitted subjects in almost any degree, even though commonsense might regard the resulting characterisation as strained. However, there may be a tendency to treat the residual power as creating an implied prohibition, with an inference that no law should touch that area at all lest a legislature with express powers under the guise of acting under one of its powers such as the taxing or defence power might assume complete control over every act of every person. An assumption of this sort was explicitly acted on by the High Court of Australia from 1903 until 1920, but even without an explicit "implied prohibition" or even after its official overthrow, the idea it expresses may have some influence on decisions. Hence, there is scope for the operation of our maxim even in a constitution having only one list of legislative powers, though to a lesser extent than in a constitution having two (or more) lists of legislative powers.

Finally, the list of forty-eight invalidity holdings have a fairly wide time spread. One might have expected
them to be mainly from the nineteenth and early twentieth century, when relevant Courts were less imbued with the presumption of validity. Actually, however, the cases fall into the following groups by date: before 1900, five cases; from 1900-1920 (Australian Engineer's Case), five cases; from 1920-1936 (United State New Deal Cases), thirteen cases; since 1936, twenty-five cases.

Putting the matter at its lowest, the maxim stands as a warning to legislatures with restricted powers that in the use of "devices" to avoid constitutional restrictions, they should not go too far.
APPENDIX

Table of Illustrative Constitutional Cases

A. List of Cases (General)


15. Cam & Sons Pty Ltd v. Chief Secretary of New South Wales (1951) 84 C.L.R. 442.


22. Davis and Jones v. Western Australia (1904) 2 C.L.R. 29.


25. Fergusson v. Stevenson (1951) 84 C.L.R. 421.


27. Fox v. Robbins (1909) 8 C.L.R. 115.


42. Minister of the Interior v. Harris [1952(4)] S.A. 769 (A.D.) (the High Court Case).
43. Moran v. Deputy Federal Commissioner of Taxation (1939) 61 C.L.R. 735 (H.C.); (1940) 63 C.L.R. 338 (P.C.).
47. Peanut Board v. Rockhampton Harbour Board (1933) 48 C.L.R. 266.

49. Pye v. Renshaw (1951) 84 C.L.R. 58.

50. R. v. Barger (1908) 6 C.L.R. 41.


55. South Australia v. Commonwealth (1942) 65 C.L.R. 373 (the First Uniform Tax Case).


59. Tunnock v. Victoria (1951) 84 C.L.R. 42.


63. United States v. Darby (1941) 312 U.S. 100.

64. United States v. De Witt (1870) 9 Wall. 41.


68. Victoria v. Commonwealth (1942) 66 C.L.R. 488 (the Public Service Case).


70. Victorian Chamber of Manufactures v. Commonwealth (1943) 67 C.L.R. 413 (the Industrial Lighting Case).


73. Woodruff v. Parham (1869) 8 Wall. 136.


B. List of Cases (General) in which the legislation was held invalid.


13. Cam & Sons Pty Ltd v. Chief Secretary of New South Wales (1951) 84 C.L.R. 442.


33. Peanut Board v. Rockhampton Harbour Board (1933) 48 C.L.R. 266.
34. R. v. Barger (1908) 6 C.L.R. 41.
35. R. v. Foster (1949) 79 C.L.R. 43.
42. United States v. De Witt (1870) 9 Wall. 41.
44. Vacuum Oil Co. Pty Ltd v. Queensland (1934) 51 C.L.R. 108.


47. Wieman v. Updegraff (1952) 344 U.S. 183.


C. List of cases which deal with prohibitions and in which the legislation was held invalid.


4. Cam & Sons Pty Ltd v. Chief Secretary of New South Wales (1951) 84 C.L.R. 442.

5. Commonwealth Oil Refineries v. South Australia (1926) 38 C.L.R. 408.


7. Fish Board v. Paradiso (1956) 95 C.L.R. 443.


D. **List of Canadian cases in which the legislation was held invalid.**


E. **List of cases which deal with powers defined by reference to purpose and in which the legislation was held invalid.**

1. Attorney-General for Victoria v. Commonwealth (1946) 71 C.L.R. 237 (the *Pharmaceutical Benefits Case*).


F. List of cases which deal with powers defined by reference to non-purposive classifications and in which the legislation was held invalid.


G. List of cases dealing with legislative schemes

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