LEGISLATIVE SCHEMES IN AUSTRALIA

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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 interconnection 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 of the enactments examined individually, or whether the validity of the enactments is to be examined individually without caring for the validity 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, a 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 have come up for discussion before the courts.

Moran's Case[1]

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 circum-

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[1] *Deputy Federal Commissioner of Taxation (N.S.W.) v. Moran* (1939) 61 C.L.R. 735; on appeal to the Privy Council *Moran v. Deputy Federal Commissioner of Taxation (N.S.W.)* (1940) 63 C.L.R. 338, [1940] A.C. 838.

stance 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 proceeeds 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.[2]

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 section 40 of the Judiciary Act 1903-1937, and Evatt J. referred it to the Full Court.

The main objections against the scheme were firstly that it involved an imposition of a tax which infringed section 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 section 51 (iii) of the Constitution.[3] 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 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. So it was argued that if Tasmania's potential taxpayers had simply been excluded from the payment of the tax, the taxing Acts would have been clearly bad because section 51 (ii)

[2] (1939) 61 C.L.R. 735, 756, 757.
[3] There were other objections but they are not relevant in the present context.

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 (or purpose) of the legislature. As Starke J. explained:

> 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.[4]

Thus the special treatment which was given to 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 section 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.'[5]

Following the same logic, objections on the ground of section 51 (iii) also failed, as the Chief Justice pointed out,[6] for several reasons: (1) payments made by the Commonwealth 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 section 96 of the Constitution which, it was thought, enabled the Commonwealth Parliament to grant financial assistance in a manner discriminating between States. 'The Constitution in

[4] (1939) 61 C.L.R. 735, 774. [5] *Ibid.*, 758. [6] *Ibid.*, 761.

section 96', Starke J. explained, '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 the provisions of section 99 of the Constitution'.[7]

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 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.[8]

Agreeing with the contention of the defendants, his Honour 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'.[9] Thus 'in substance and reality', his Honour 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'.[10]

It was pointed out by Evatt J. that the principle applied in the characterization of a legislation, that legislation which at first appeared to conform to constitutional requirements might be void if colourable or disguised, was equally applicable to a 'legislative scheme' such as the one under consideration.[11] Thus the main task was to pick out the purpose of the scheme, and the validity of the 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',[12] and the taxation discrimination was not merely the result of the Tasmanian Act:

> 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 the Commonwealth taxpayers who are associated with that one State.[13]

[7] *Ibid.*, 775. [8] *Ibid.*, 778. [9] *Ibid.*, 786. [10] *Ibid.*, 787. [11] *Ibid.*, 794.
[12] *Ibid.*, 801. [13] *Ibid.*, 803.

As to section 96, it was said that it could not be employed for the very purpose of nullifying guarantees provided elsewhere in the Constitution.[14]

On appeal,[15] the Privy Council recognized in principle the view adopted by Evatt J. but disagreed with his Honour's application of the test of 'colourable' legislation in this instance. Their Lordships, approving the principle laid down in the majority opinion in *The King v. Barger*,[16] thought that where there was admittedly a scheme of proposed legislation, it was necessary to examine the Acts constituting the scheme together. Their Lordships added that:

> The separate parts of a machine have little meaning if examined without reference to the function they will discharge in the machine.[17]

For example, though the Commonwealth Parliament felt obliged by section 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 section 51 (ii), section 51 (iii) or section 99, otherwise it would be turning 'a blind eye to the real substance and effect of the Acts'.[18] But their Lordships, in contrast with Evatt J., came to the conclusion that there was nothing objectionable in the scheme 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 section 51 (ii), was rejected on the ground that such a contention would be beyond the scope of the prohibition contained in section 51 (ii) and it would be a mistake to regard that prohibition as providing for equality of burden as regards taxation.[19] Their Lordships observed:

> 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.[20]

As regards section 96, their Lordships tried to reach a sort of compromise between that section and section 51 (ii) and section 51 (iii) in the sense that section 96, apart from the prohibitions contained in

[14] *Ibid.*, 802. [15] (1940) 63 C.L.R. 338 (P.C.), [1940] A.C. 838.
[16] (1908) 6 C.L.R. 41, 74, 75. [17] (1940) 63 C.L.R. 338, 341. [18] *Ibid.*, 346.
[19] The prohibition in s. 51 (iii) was also regarded as not providing for equality of benefit as regards bounties.
[20] (1940) 63 C.L.R. 338, 348; quoted from *The King v. Barger* (1908) 6 C.L.R. 41, 108.

section 51 (ii) and section 51 (iii), did not 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.[21]

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 prohibitions contained in section 51 (ii) and section 99. Evatt J. emphasized 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 his Honour, 'the Commonwealth would collect from all taxpayers alike; but it would refund the tax solely because of considerations applicable to a single State'.[22] 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.[23]

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 section 51 (ii) and section 99 were intended by the framers of the Constitution to establish *formal and not material* equality,[24] and this scheme achieved *formal* inequality.

Their Lordships visualized that *prima facie* there was no limitation upon the exercise of the power conferred on the Commonwealth by section 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 manner between the States, might still be held invalid under the prohibitions contained in section 51 (ii) and section 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 sub-

[21] *Ibid.* 349 (author's italics).
[22] (1939) 61 C.L.R. 735, 783.
[23] (1940) 63 C.L.R. 338, 349.
[24] See Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), 549.

stance and purpose of the Act might be simply to effect discrimination in regard to taxation.[25]

But then could it not be said that the scheme in the present case was a colourable exercise of section 96 so as to nullify the constitutional safeguard provided in section 51 (ii) or section 99? According to Evatt J. it was; but their Lordships justified it by saying that it was for the purpose of equalizing 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 the other based on *material* considerations. Their Lordships also realized 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 'legislative schemes' as a 'colourable' device and the readiness on the part of the courts to call for evidence to determine the purpose of such devices. In a way it is affirmation of the principle explained and applied by Evatt J. in his dissent.

Land Settlement Cases[26]

These cases illustrate that if two or more Acts are clearly interconnected 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 *P. J. Magennis Pty Ltd v. Commonwealth*,[27] an agreement was made between the Commonwealth and the State of New South Wales with a view 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 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 section 4 (1) of the Closer Settlement (Amendment)

[25] (1940) 63 C.L.R. 338, 350.
[26] *P. J. Magennis Pty Ltd v. Commonwealth* (1949) 80 C.L.R. 382; *Tunnock v. Victoria* (1951) 84 C.L.R. 42; *Pye v. Renshaw* (1951) 84 C.L.R. 58.
[27] (1949) 80 C.L.R. 382.

Act 1907-1948 (N.S.W.) with respect to land acquired for the purpose of the scheme contained in the agreement. Under section 4 of the Closer Settlement (Amendment) Act, 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 purpose 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 authorizing it was *ultra vires,* and that the provisions of the Closer Settlement (Amendment) Act, and in particular section 5, were invalid; the plaintiff, therefore, 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 section 51 (xxxi)[28] of the Constitution; that the agreement authorized 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 contained in section 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 (section 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

[28] S. 51 (xxxi) gives the Commonwealth Parliament power with respect to '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'.

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 section 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'.[29] There was nothing in section 51 (xxxi) limiting its application to either a law which created a previously non-existing power in some person to acquire property or a law 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'.[30] In the same tone Webb J. said that section 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.[31] 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 authorising only the execution of the agreement, but the 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.[32]

On the other hand 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 section 51 (xxxi). The Act simply authorized the execution of the agreement and secured its Parliamentary approval. Dixon J. explained:

> 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 authorise 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.[33]

[29] (1949) 80 C.L.R. 382, 402. [30] *Ibid.*, 423, 424. [31] *Ibid.*, 429. 430. [32] *Ibid.*, 402. [33] *Ibid.*, 410, 411.

Co-operation between the Commonwealth and the States is one of the devices to achieve a certain object that 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 has acted within its constitutional powers. However, if the Acts are inter-connected, 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 or purpose, as opposed to motive or the ultimate end or consequence, 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 characterizing the Commonwealth Act with respect to the acquisition of property.

Nevertheless, 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:

> 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 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 it has no effect.[34]

Or to put it in the words of Williams J. who more or less adopted 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 (Amending) Acts of 1946 and 1948.[35]

[34] *Ibid.*, 403, 404.
[35] *Ibid.*, 420.

These arguments raise an important question in the construction of statutes, whether a term such as the *validity* of an agreement could be implied so as to make 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'.[36] Referring to the relevance of the agreement his Honour pointed out 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 legislation takes the form of authorizing 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 powers defined in the Constitution by making such an agreement? McTiernan J. observed that:

> It would be surprising 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 own Constitution a condition in the Commonwealth Constitution restricting Commonwealth power only.[37]

The subsequent decisions of the High Court limited the scope of *Magennis's 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 an agreement or law and 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. This was what actually happened in *Pye v. Renshaw*,[38] and also in *Tunnock v. Victoria*.[39]

After the decision in *Magennis's Case* the War Service Land Settlement Agreement Act 1945 (N.S.W.) was repealed and a new law was

[36] *Ibid.*, 408. [37] *Ibid.*, 416. [38] (1951) 84 C.L.R. 58. [39] (1951) 84 C.L.R. 42.

passed by the State legislature. This amended the new sub-section which had been added in 1946 to section 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 purpose of section 3 of the War Service Land Settlement Act 1941 (N.S.W.). Section 3 of the Act authorized the Minister to set apart any area of Crown land, or land acquired by the Crown, to be disposed of exclusively to discharged persons 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. It was said that 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's 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 of Victoria and were, therefore, not affected by the invalidity of the War Service Land Settlement Agreement Act 1945 (Cth).

It may be noted that the State legislation involved in *Magennis's Case* differed only in *form* from those 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 section 51 (xxxi) for closer settlement of a certain class of persons on that land. If the decision in the latter *cases* is correct and it is submitted that it is, *Magennis's Case* may be said to have been virtually overruled.

The weakness in the majority judgment of *Magennis's Case* became more apparent from the fact that no reference to that case was made in *Brown v. Green,*[40] a case in which the operation of a State Act incorporating determinations made under Commonwealth regulations which had ceased to operate was questioned. Section 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

[40] (1951) 84 C.L.R. 285.

that all determinations of fair rents made before the commencement of the Act under the National Security (Landlord and Tenant) Regulations[41] 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 questioned the continued validity of the regulations and then argued that the State Acts 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.[42]

This is, in a way, vindication of the minority judgments in *Magennis's 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 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's 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 his Honour 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 Tas-

[41] As in force immediately before the commencement of the Act under the Defence (Transitional Provisions) Act 1946-1947 (Cth).
[42] (1951) 84 C.L.R. 285, 292.

manian Act which also formed part of the scheme. Thus even on this ground it is rather doubtful if the majority opinion in *Magennis's Case* can be supported.

However, *Magennis's 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 Acts 1920-1950 have 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[43] (except in the Preamble) or the Commonwealth Act; on the other hand the Victorian legislation 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.[44]

Uniform Taxation Cases[45]

These cases illustrate a situation where 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 providing an example of a 'legislative scheme' as a successful device to by-pass constitutional provisions. 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*[46] 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 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

[43] 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.

[44] See *The King v. Burgess; ex parte Henry* (1936) 55 C.L.R. 608.

[45] *South Australia v. Commonwealth* (1942) 65 C.L.R. 373; *Victoria v. Commonwealth* (1957) 99 C.L.R. 575.

[46] (1942) 65 C.L.R. 373 (the *First Uniform Tax Case*).

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 this legislative scheme

> 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 the State by means of income tax in the financial years ended June 1940 and 1941.[47]

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 invalid.[48] The two latter Acts were explained by the plaintiffs as carrying out the scheme contained in the first two Acts and they were therefore also challenged on the same grounds. But in the High Court the scheme was held valid by varying majorities as to 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 considered 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 involved also so that one could get a clear picture of what was being contemplated by the Commonwealth. It was thus contended that an Act which did not refer to or incorporate any other Act and which when considered by itself was not invalid might still be held invalid by reason of the enactment of other Acts. Latham C.J. visualized many difficulties in accepting that contention and then observed:

[47] *Ibid.*, 447, 448.

[48] The Acts were also objected to on grounds of s. 51 (ii) and s. 99 of the Constitution.

> 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.[49]

These observations are only an addendum to what was already expressed in *Moran's Case*.[50]

However, Latham C.J. did not think it necessary in the present case to examine the Acts as parts of a legislative scheme. His Honour 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,[51] and if such an intention is fatal to the validity of Commonwealth legislation it is not necessary to allege or prove any "scheme".[52]

It is submitted that the very fact that the 'intention' or 'purpose' might be fatal is precisely the reason why it was necessary to allege or prove any 'scheme'. It is by reference to the 'intention' or 'purpose' that the validity of Acts constituting a scheme is to be determined, if 'intention' or 'purpose' is fatal in any sense. Of course, 'intention' or 'purpose' may not be confused with 'motive' or 'ultimate indirect consequences' which may be regarded as irrelevant in the characterization of a law.

Starke J. joined hands with the Chief Justice in dealing with the Acts separately as not forming parts of a scheme, but on a different ground. 'But the scheme of legislation is', his Honour thought, 'unimportant unless the legislation is connected together and the provisions of the legislative Acts are dependent the one upon the other';[53] it was found that such was not the case there. 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.

Here we may recall the suggestion made by their Lordships in *Moran's Case*:[54] 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, for example, a taxation Act and an appropriation or tax-assessment Act. Williams

[49] (1942) 65 C.L.R. 373, 411.
[50] (1939) 61 C.L.R. 735, 761, 762, *per* Latham C.J.
[51] The Income Tax Act 1942 (Cth), the States Grant (Income Tax Reimbursement) Act 1942 (Cth), and the Income Tax (War-time Arrangements) Act 1942 (Cth).
[52] (1942) 65 C.L.R. 373, 411. [53] *Ibid.*, 448. [54] (1940) 63 C.L.R. 338, 341, 345, 346.

J. seemed to have noticed such a connection in *Moran's Case;* his Honour 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.[55]

In a case as the present one it might also not perhaps be inappropriate to examine the Acts constituting the scheme as a whole. However, to notice a clear connection or interaction in between the Acts so as to 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. Section 221 of the Income Tax Assessment Act 1942 which was introduced into that Act as an amendment to section 31 of the Assessment Acts 1935-41, was amended by section 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 1946-1948 Act. The Income Tax (War-time Arrangements) Act 1942 was discontinued as it had done its work. The validity of these enactments as amended was challenged again in *Victoria v. Commonwealth.*[56]

In the *First Uniform Tax Case* it was the defence power that loomed large,[57] 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 validly be continued in peace-time. Furthermore,

[55] (1942) 65 C.L.R. 373, 462.
[56] (1957) 99 C.L.R. 575 (the *Second Uniform Tax Case*).
[57] 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, 463, 464, *per* Williams J.

doubts arose as to the validity of the scheme after the decision in *Melbourne Corporation v. Commonwealth*[58] in which the doctrine of federal implications was revived in a modified form.

This time the plaintiff 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: (i) that the Grants Act was invalid because it did not grant financial assistance within the meaning of section 96 of the Constitution, and further that it interfered with the States in the exercise of their power to impose income tax and so interfered with their independence; (ii) that section 221 of the Assessment Act 1936-1956, which gave Commonwealth tax priority over State tax, was invalid mainly because it was not authorized by any provision of the Constitution; (iii) that the Grants Act and section 221 of the Assessment Act 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 section 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 section 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 section 51 (ii) of the Constitution.

Section 221 (1) (a) of the Assessment Act was sought to be justified under section 51 (ii)[59] and section 51 (xxxix)[60] of the Constitution, but this justification was not accepted by the High Court and on this point the *First Uniform Tax Case* was disapproved.[61] 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 reaches into the exercise of the constitutional powers of the States.[62]

It may be noted that though the plaintiff States disclaimed reliance on any legislative plan, it was still sought to rely upon the purpose

[58] (1947) 74 C.L.R. 31.
[59] The power with respect to taxation.
[60] The power with respect to matters incidental to the execution of any power vested by the Constitution.
[61] Taylor J., though agreeing with the majority, was of the view that in the *First Uniform Tax Case*, that provision was justified as being a temporary measure designed to deal with a special situation, *inter alia*, a war-crisis, but it could not be given a permanent operation so as to be valid in peace-time.
[62] (1958) 99 C.L.R. 575, 614.

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 with this view when his Honour referred to both the nature and history of paragraph (a) of section 221 (1):

> 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.[63]

However, the 'absolute' priority given to the Commonwealth by section 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.

Commonwealth-State Co-operation in Other Cases

It has often been found desirable and necessary in Australia to provide for organized 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 in conflict with section 92 of the Constitution. By virtue of section 92 of the Constitution, any marketing scheme, Commonwealth or State, which interferes with inter-State trade, commerce and intercourse would be unconstitutional and, therefore, inoperative.[64]

Constitutionally a State could provide for an organized marketing scheme, but its operation would be confined within that State, whereas the Commonwealth could control and regulate the export and import trade in a commodity, and that would not be very effective in achieving the desired aims. Under these circumstances a device was evolved through the co-operation of the Commonwealth and the States by exploiting fully their respective constitutional powers to achieve a result which could not be achieved by the Commonwealth or the States acting individually. Such a scheme came up for consideration before the High Court in *Wilcox Mofflin Ltd v.*

[63] *Ibid.*, 614.

[64] See generally Anderson, 'Freedom of Inter-state Trade; Essence, Incidence and Device under Section 92 of the Constitution' (1959) 33 *Australian Law Journal* 276 and 294.

New South Wales.[65] 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';[66] the overseas price of hides remained very high during the war and thereafter as compared with the domestic prices. 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,[67] 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 or intercourse, or required or intended by the owners for such trade, commerce or intercourse. Though the plaintiffs challenged certain provisions of the State Act[68] as infringing section 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.[69] However, it would not be illegitimate to infer that the vesting of a commodity in a Commonwealth instrumentality is constitutional.

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 in the wheat stabilization scheme, the scheme 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.[70] The wheat industry stabilization scheme is similar to the one involved in the *Hides and Leather Case*.[71] The Federal Act[72] provided for the establishment of

[65] (1952) 85 C.L.R. 488. For a general discussion of this case in this context see Anderson, 'The Main Frustrations of the Economic Functions of Government, caused by Section 92 and Possible Escapes Therefrom' (1953) 26 *Australian Law Journal* 518, 519-523.

[66] (1952) 85 C.L.R. 488, 506.

[67] All the six States adopted uniform legislation. As regards the Federal territories, the Federal Act contained the like compulsive provisions with respect to them.

[68] It was the Hide and Leather Industries Act 1948-1949 (N.S.W.) which was referred to in detail.

[69] (1952) 85 C.L.R. 488, 514, 515.

[70] Refer to Comans, 'Co-operation between Legislatures in a Federation' (1953) 31 *Canadian Bar Review* 814; Anderson in *Essays on the Australian Constitution* (2nd ed. 1961) 93.

[71] (1952) 85 C.L.R. 488.

[72] The Wheat Industry Stabilisation Act 1948 (Cth); in 1953 the citation of the Act, as amended, became the Wheat Marketing Act 1948-1953 (Cth).

a Board with powers necessary for stabilizing the wheat industry, while the State Acts[73] 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[74] as well as the New South Wales Act[75] made 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 authorize 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.[76] 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[77] 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.

Conclusion

From the cases discussed above it seems 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 'legislative scheme' would be held invalid even when its existence is *patent*. There were strong indications in *Moran's Case* that enactments might be treated 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*

[73] For example, the Wheat Industry Stabilisation Act 1951 (N.S.W.).
[74] The Coal Industry Act 1946-1958 (Cth).
[75] The Coal Industry Act 1948-1957 (N.S.W.).
[76] A similar arrangement was later made between the Commonwealth and the State of Tasmania: see the Coal Industry (Tasmania) Act 1949 (Cth).
[77] The River Murray Waters Act 1915-1958 (Cth), the River Murray Waters Act 1915-1958 (N.S.W.).

Tax Case. However, the object of the scheme may be referred to, as indicated in the *Land Settlement Cases* and the *Second Uniform Tax Case*, in understanding the *real* purpose of the enactments, and by reference to that purpose the validity of the enactments may be examined *individually*.

The same attitude was taken in South Africa so far as a legislative scheme was concerned with the rights of the Natives protected by section 35 and section 152, known as the 'entrenched clauses', of the South Africa Act 1909. In *Collins v. Minister of the Interior*,[78] the Senate Act of 1955 and the South Africa Act Amendment Act of 1956 were challenged as forming parts of a legislative scheme designed to effect indirectly the rights of the Natives in violation of the 'entrenched clauses'. Both the Acts were held valid by the Cape Provincial Division, and on appeal the Appellate Division, with the dissent of Schreiner J.A., confirmed the decision of the Provincial Division. According to the majority, both the Acts, when taken by themselves, were not invalid as the procedure adopted in the passing of the two Acts was in accordance with the provisions of the South Africa Act 1909; it did not matter that the Senate Act was passed only to create an artificial majority, *viz*. two-thirds majority when the Union Parliament was sitting bicamerally, for the purpose of passing the South Africa Act Amendment Act as required by the 'entrenched clauses'. However, the object or purpose of the scheme was regarded as altogether irrelevant. It may perhaps be justifiable because firstly South Africa had a unitary constitution in the South Africa Act of 1909, and secondly the scheme was concerned with guaranteed rights of individuals and not with legislative powers, central or regional, in a federation.

It is likely that the same attitude might be taken in the United States. In *Railroad Retirement Board v. Alton Railroad Co.*[79] 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 in the Supreme Court. Though the taxing provisions relating to the contribution made by the employers and employees to a common fund were declared unconstitutional on merit as being beyond the scope of the commerce power, the spending provisions relating to the pensions to be paid out to those who were retired compulsorily were held unconstitutional simply because the latter were unseverable

[78] [1957] 1 S.A. 552 (A.D.). For a detailed discussion of the case see Marshall, *Parliamentary Sovereignty and the Commonwealth* (1957) Ch. 11. Also refer to Hahlo and Kahn, *The British Commonwealth—The Development of its Laws and Constitution* V, 160-162 (the Union of South Africa).

[79] (1935) 295 U.S. 330. For comments on the case see (1935) 35 *Columbia Law Review* 933.

from the former; Justice Roberts, speaking for the majority, observed that the Act could not be rewritten and given an effect altogether different from that sought by it when viewed as a whole.[80] Thus if an Act deals with taxing as well as spending aspects of a programme for the attainment of a prohibited end, the whole of the Act would be rendered unconstitutional. But suppose taxing and spending aspects of an Act are severed from one another and they are provided in two separate Acts as constituting parts of a plan for the attainment of a prohibited end, *i.e.*, regulation of a subject matter within the State's reserved jurisdiction. Would the Acts stand a better chance than before so far as federal power is concerned? Following *Massachusetts v. Mellon*,[81] and the way that case was distinguished in *United States v. Butler*,[82] Congress attempted to put the Railroad Retirement Pension Act 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, provided for the creation of a fund from which pensions could be paid along the lines of the original plan.[83] This plan has never been tested in the courts. On the other hand, its constitutionality appears to have been taken for granted by the Supreme Court in *Railroad Retirement Board v. Duquesne Warehouse Co.*[84]

The existence of a legislative plan as a ground for the invalidation of an Act seems to have a better recognition in Canada than in Australia. In *Attorney-General for Alberta v. Attorney-General for Canada*,[85] one of the considerations that moved their Lordships to declare *ultra vires* the Taxation of Banks Bill of Alberta 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.[86] It was noted that the Bill contained no reference

[80] (1935) 295 U.S. 330, 362. The unseverability of taxing and spending aspects of an Act was more specifically emphasized in *United States v. Butler* (1936) 297 U.S. 1.

[81] (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.

[82] (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.

[83] The Act was first amended in 1937, 50 U.S. Stat. 307, and then thoroughly revised in 1946, 59 U.S. Stat. 722.

[84] (1946) 326 U.S. 446. A similar scheme consisting of two separate Acts, one imposing a tax on carriers and the other authorizing appropriations from the general funds of the Treasury for retirement benefits for railroad employees, was sustained in *California v. Anglim* (1942) 129 F. 2d. 455, Cert. denied (1942) 317 U.S. 669.

[85] [1939] A.C. 117.

[86] *Reference re Alberta Statutes* [1938] Can. S.C.R. 100. Though the validity of

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 for the raising 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 only proper authority, the Parliament of Canada.[87]

This attitude may be likely due to the double enumeration of legislative powers in the British North America Act of 1867 and the predominance and frequent application by the Privy Council of rules or principles like 'pith and substance' or 'double aspect doctrine' in the characterization of statutes. However, it is not certain that the mere existence of a legislative plan would by itself be sufficient to invalidate an Act; it may rather be relied upon as an aid to other rules or principles frequently applied by the courts in determining the true nature and substance of an Act.

In Australia, 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.

Further, 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 a Commonwealth Act that could be questioned as State Acts do not come within the operation of these prohibitions.

As regards a legislative scheme 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, whether valid or invalid, would be irrelevant. Thus following the latter course the operation of a legislative scheme could be assured even if the agreement itself might not be valid, provided

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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*, [1939] A.C. 117, 132, 133.

[87] *Ibid.*, 133.

the legislatures have acted within the ambit of their powers respectively.

In *Magennis's 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 the operation of a statute dependent on a condition? There is no reason why a statute may 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 may be expressed as intended to operate only if a specified statute is valid. The objection is to interpreting a statute in this way when plainly its operation was not so conditioned.

In Canada, schemes for marketing or regulation of trade in certain commodities, whose operation goes beyond the territorial limits of a province, have been made effective by co-operation between the Dominion and a province, or provinces, taking the form of a single board empowered to administer regulations referred to it by both Dominion and province, or provinces, on agreed measures. Such schemes involving delegation of executive or administrative power, including rule-making, have been held constitutionally permissible.[88] Could the same also be assumed in Australia? In the Australian Constitution section 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 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 the Commonwealth to a State, or States, and by a State, or States, to a Commonwealth instrumentality are not unconstitutional. The

[88] See *Potato Marketing Board v. Willis and Attorney-General for Canada* [1952] 4 D.L.R. 146; *Reference re Ontario Farm Products Marketing Act* [1957] 7 D.L.R. (2d) 257.

frequency of the practice and the absence of challenge suggest that such devices would pass through judicial review.

In conclusion, it may be said, at any rate in Australia, that 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.