a possible practical difference, however, is that in the case of a member it would be difficult to prove absence of reasonable and probable cause if the fine was within the limits set by the rules.

The Lords, therefore, have left the question as to the legal definition of a "legitimate interest" fairly open, but as this phrase is well known in the law of civil conspiracy, it is presumed that decisions in tort will be used to make more definite this rather vague phrase. In other words, *Thorne's* case has settled the issue for trade protection associations, but the type of problem discussed by Goodhart still needs a solution—What is the definition of a legitimate interest? The answer is that such a definition would be perilous, and that the matter is left for decision as concrete cases arise.

G. W. PATON.

ATTORNEY-GENERAL FOR NEW SOUTH WALES v. HOMEBUSH FLOUR MILLS LTD. (1937) A.L.R. 167

The *Homebush* case provides further illustration of the difficulty experienced by the States, however ingenious their draftsmen, in attempting to overcome their financial disabilities under the Federal Constitution by the application of the delicate principle that the expropriation power may be validly exercised provided it be in general terms, without discrimination and without reference to constitutional guarantees.[1]

By the Flour Acquisition Act 1931 (N.S.W.),[2] the Minister was empowered to compulsorily acquire all flour (except self-raising flour) as and when gristed in New South Wales, and the proprietary rights in the flour were converted into claims for compensation at "the fair and reasonable price" assessed by a Committee constituted by the Act. The owner was given the first right to repurchase the flour at "the standard price" fixed by the Governor-in-Council, which price was, in fact, higher than "the fair and reasonable price." Further, any sale or disposition by the owner was deemed an exercise of the right of repurchase, and he became liable for the difference in the two prices. If the owner did not repurchase, the Minister might sell the flour and reimburse him at the rate of "the fair and reasonable price," or the amount actually realized less expenses, whichever was the less. The revenue created by the difference in the two prices was appropriated to a special fund set up under the Audit Act, called, in description of its object, the Relief to Necessitous Farmers and Graziers Working Capital Account.

In this case the Attorney-General for New South Wales, on information issued out of the Supreme Court, sought to recover £8,479/3/9 from the Homebush Flour Mills, as the difference at £1/10/- per ton between "the fair and reasonable price" at £8/10/- and the "standard price" at £10. The defendant demurred on the ground that the Act

1. The *Wheat* case (1915) 20 C.L.R. 54.
2. Discontinued in 1933.

was *ultra vires* the State Parliament, in that it contravened Sections 90 and 92 of the Constitution. Argument was confined to Section 90, and the High Court upheld the demurrer on the ground that the Act imposed a tax in the nature of a duty of excise within the exclusive power of the Commonwealth, adopting the proposition in *The Commonwealth, etc., v South Australia*[3] that Section 90 gives exclusive power to the Commonwealth over all indirect taxation imposed immediately or in respect of goods, and does so by compressing every variety thereof under the term "Customs and Excise." The view was upheld that, although a State may legislate to acquire property and then dispose of the property so acquired at will, if the real object of the legislation is to interfere with interstate commerce, or to impose taxation in the nature of Customs or Excise duty, the legislation is invalid. The power of expropriation must not be used to infringe Section 92, "and what is true of Section 92 is also true of Section 90 or any other overriding constitutional provision."[4] The High Court's reading of the decision of the Privy Council in *James v. The Commonwealth*[5] would seem, therefore, to imply that the metaphysics of the real object test are to be retained.

It was pleaded that the Act did not impose taxation, because a miller had the option of not paying money to the Government. However, a miller could not dispose of his flour otherwise than to the Government without being deemed to repurchase it. To carry on his trade by selling the flour he gristed, he had either to repurchase it from the Government or pay the difference in the prices when otherwise sold. The remaining alternative was to cease business. In the words of Latham C.J., the option was "quite illusory." Then it was argued that, as the money was paid by agreement under the Act, it was not a tax. This contention was rejected on the well-known constitutional ground that where money is paid to a Government in obedience to what is really a compulsive demand the money is paid as a tax.[6] The difference in the two prices payable to the Government was, therefore, a tax, "more clearly so than in the *Wooltops* case."[7] The Act made the raising of money its object, and sought fulfilment thereof by the imposition of distinct detriments on the miller refraining to pay. That the impost was designed in relation to a sale or disposition was clear because of the powerful deterrents directed to millers who refrained from selling, e.g., storage at own expense and risk for a period at the discretion of the Executive, loss of power over his flour and title only to the net proceeds of sale by the Crown, "the fair and reasonable price," or that actually realized, less expenses, whichever was the less. These provisions operated as sanctions on non-sale. The High Court then had little difficulty in holding that, as the tax was payable on the occasion of the sale of goods manufactured or produced,

3. (1926) 38 C.L.R. 408.
4. *Per* Evatt J., at p. 171.
5. (1936) A.C. 578.
6. *A.G. v. Wilts United Dairies Ltd.* (1922) 38 T.L.R. 781; and *Wooltops* case (1922) 31 C.L.R. 421.
7. *Per* Rich J., at p. 166.

it was an internal revenue duty by way of indirect taxation amounting to an Excise duty within the meaning of the term in *The Commonwealth, etc., v. South Australia.*[8]

The most profound problem in the case, however, arises out of the dictum of Evatt J. when he says:[9] "It is plain that the question is one as to the limits *inter se* of the constitutional powers of the Commonwealth and the State of New South Wales, so that, although the demurrer was entered in the Supreme Court of New South Wales, it would, in any event, have fallen to be determined by this Court in pursuance of the operation of Sections 38A and 40A of the Judiciary Act."[10] The demurrer, as involving the interpretation of the Constitution, was, in fact, removed into the High Court pursuant to Section 40 of the Judiciary Act 1903-1936, so that the question whether an *inter se* question arose was not material. Nevertheless, the problem exists: Can an *inter se* question arise on an adjudication whether an exercise of power by a State is *ultra vires* on the ground that the power is exclusively vested in the Commonwealth? The submission made in this note is that the existence of an *inter se* question in such a case is, apart from being plain, open to considerable argument.[11] The vesting of an exclusive power in the Commonwealth is, in substance, a denial of, a check, restraint, or *prohibition*[12] on power in the States. A determination of the extent and nature of such a prohibition does not appear to delimit the *power* vested in the Commonwealth. The Commonwealth's power remains precisely the same irrespective of the quantum of power withdrawn from the States by interpretations of sections similar to Section 90, and in effect there is no mutuality. This reasoning is founded on Dixon J.'s judgment in *ex parte Nelson* (No. 2),[13] and seems to be supported by the Privy Council's decision in *James v. Cowan.*[14]

Dixon J. says:[15] "The expression limits *inter se* refers to some mutual relation between the powers belonging to the respective Governments of the Federal system. The required relation has been found in the effect which the process of defining the specific and paramount powers of the Commonwealth Parliament must have upon the ascertainment or determination of the amount of plenary power retained by the Legislatures of the States." It is thought that the learned Justice uses technical language when he refers to "the process of defining the specific and paramount powers," meaning specific in antithesis to exclusive, and paramount, perhaps unfortunately, in relation to Section 109. He continues: "The essential feature . . . is a mutuality in the relation of the constitutional powers: a reciprocal effect in the determination or ascertainment of the extent or the con-

8. (1927) 38 C.L.R. 408.
9. At p. 170.
10. Evatt J. also expressed this opinion in *Vacuum Oil Co. v. Queensland* (1934) 51 C.L.R.. at p. 139.
11. The writer is aware that Professor K. H. Bailey supports Evatt J. "without hesitation," and that Mr. C. I. Menhennitt, Acting Lecturer in Constitutional Law II, is writing a note in support.
12. (1934) 51 C.L.R., at p. 139.
13. (1929) 42 C.L.R. 258.
14. (1932) 47 C.L.R. 386.
15. (1929) 42 C.L.R,, at pp. 270-271.

stitutional supremacy of either of them. This feature is quite absent when the question is about the meaning or application of a check or restraint to which all the Governments are subject." In view of the fact that Dixon J. held that Section 92, even if directed to the States alone, was such a check or restraint as to negative an *inter se* question, it would seem that the same analysis would apply to Section 90.

His Majesty's Board in *James v. Cowan,* by holding no *inter se* question arose on a determination of Section 92, and that it had jurisdiction to hear an appeal without a certificate from the High Court, gave its imprimatur to Dixon J.'s analysis, as it is the Tribunal constituted to determine when such questions do arise.[16] The Board was of the opinion that to arrive at this result it was not necessary to consider whether Section 92 bound the Commonwealth or not. If, however, Section 92 bound the States, but not the Commonwealth, the combined operation of Sections 51 (i) and 92 would result in exclusive power over interstate trade being vested in the Commonwealth. It would seem, therefore, that if an *inter se* question arises on a determination of an exclusive power, the Privy Council in *James v. Cowan* wrongly refused to consider whether Section 92 bound the Commonwealth. It did say, however, that "the State is forbidden to pass legislation or to grant executive powers of a certain kind (interfering with absolute freedom of trade, etc.). The only question is whether it has violated the prohibition or not."[17] The contention of the writer is *mutatis mutandis* Section 90, or, in the words of Evatt J. in another context (*supra*), "What is true of Section 92 is also true of Section 90 or any other overriding constitutional provision."

An *ultra vires* issue where a prohibition is involved would seem to have a different result from one where an affirmative power is involved. The effect of the former is that the States or Commonwealth have no power, and of the latter that a particular exercise of power is beyond the limits of a power. If there are not two powers, under whatsoever head arising, there can be no mutuality. Once it is determined that an exercise of power falls within the category of Customs and Excise, power is immediately denied to the States. The result is the same as holding that the Dried Fruits Act was within the trade and commerce immunity, and therefore *ultra vires* the Legislature of South Australia, irrespective of the Commonwealth's position. The meaning and application of Section 90 defines the extent of no-power in the States, irrespective and without reference to the power of the Commonwealth. In other words, adjudications on Section 90 merely involve the *limits*; some effect must be given to the words *inter se,* and this appears impossible when the relation is that of power no-power.[18]

CLIFTON McPHERSON.

16. *Jones v. Commonwealth Court of Arbitration, etc.* (1917) A.C. 528.
17. At p. 398.
18. The writer does not feel the conviction he expresses. Consideration of *inter se* questions finds him alternating between the belief that they are raised on every constitutional issue, and that they are mythical. Whatever basis there may be for the latter, it is felt that *ex parte* Nelson and James and Cowan introduced a refinement that could well be abandoned. What of the converse of the position here? Would the determination that an exercise of Commonwealth power is *ultra vires* Section 90 tell anything about what is given to the States by the constitution?