that " a marriage is invalid . . . if either party is by his personal law under an incapacity to contract it, whether absolute, in respect of age, or relative in respect of the prohibited degrees of consanguinity or affinity."[6]

It will be noted, in passing, that Bennett J. deals with the case on the basis of the issue raised being a pure question of capacity. English cases beginning with *Mette v. Mette* have used the terms " prohibited marriage " and marriage of which the parties are " incapable " almost interchangeably. No attempt is made in this case to carry the analysis any further by distinguishing—as American jurists have done—between capacity and essential validity.

The decision is very interesting in view of its complete rejection of Cheshire's advocacy of the law of the matrimonial domicil as the governing law for marriage-capacity issues. He contends that " it is the law of the husband's domicil, i.e., the law of the matrimonial domicil, which ought to decide, for example, whether the parties are of sufficient age to marry or whether the marriage is prohibited on the ground of near relationship."[7] He claims, further, that logically and on principle it is the community of the husband's domicil that must be solely interested in the status of its married inhabitants. *Mette v. Mette* is explained as upholding this argument on the ground that both parties contemplated a matrimonial residence in England.

As we have seen, however, Bennett J. in the case under discussion paid no heed to the view that the matrimonial domicil of the parties was of any importance in *Mette v. Mette*. Actually in the case under discussion the husband retained his domicil of origin. Unless this decision is reversed or overruled it seems then that Cheshire's contention must be rejected—however commendable a single unifying rule may be in conflict of law cases. In terms of local law *In re Paine* may be summed up as follows: if a Victorian incapable of marriage according to Victorian law marries abroad a person there domiciled, the marriage being valid according to the *lex loci celebrationis*, the marriage will not be recognized in Victoria.

—T. PYMAN.

6. *Private International Law*, 7th edn., p. 57.
7. Cheshire, op. cit., p. 220.

THE WHEAT INDUSTRY ASSISTANCE SCHEME.[1]

Deputy-Federal Commissioner of Taxes (N.S.W.) v. Moran Pty. Ltd.[2]

In execution of a scheme to ensure a payable price to wheat-growers, evolved at a conference of Commonwealth and State representatives, the Commonwealth Parliament passed four Acts[3] imposing taxes on flour, payable by the millers, and the Wheat Industry Assistance Act, 1938 (W.I.A.A.) appropriating the revenue " for financial assistance to the States in the provision of assistance to the wheat industry."[4] Section 6 of this Act provided for payments to the States, expressly for distribution

1. The writer gratefully acknowledges the assistance he has derived in preparing this note from discussion with the Honours class in Constitutional Law II.
2. (1939) 61 C.L.R. 735; [1940] 3 All E.R. 269.
3. Flour Tax Act, 1938; Flour Tax (Stocks) Act, 1938; Flour Tax (Imports and Exports) Act, 1938; Flour Tax (Wheat Industry Assistance) Assessment Act, 1938.
4. The title of the Act.

to wheat-growers in proportion to the wheat sold by each. Section 14 provided for a special payment to Tasmania (which, producing little wheat, would receive little assistance under s. 6, while paying increased bread prices equally with other States), to be determined by the Minister, but not to exceed the difference between the amount paid in taxation and the amount received under s. 6. The Tasmanian Parliament completed the scheme by passing a Flour Tax Relief Act, appropriating this special grant to reimburse the millers. The object of this part of the scheme was to exempt Tasmanian millers from the tax. If the Commonwealth Parliament had itself refunded the tax to them, the scheme would certainly have been invalid as involving a discrimination between States, contrary to s. 51 (ii.) of the Constitution[5]; therefore the method was adopted of granting financial assistance to Tasmania under the powers conferred by s. 96 of the Constitution,[6] and leaving that State, acting in co-operation, to use the grant to reimburse the taxpayers.

The defendant, a milling company in New South Wales, refused to pay the tax, alleging in defence to the Commissioner's action, *inter alia*, that, although on its face the W.I.A.A. purported to provide financial assistance to the State of Tasmania, s. 14 operated in substance to refund taxation to the taxpayers in Tasmania, thus causing the taxing scheme itself to discriminate between States.

The High Court[7] upheld the scheme, holding that the W.I.A.A. was in substance a valid exercise of the powers conferred by s. 96, and not an Act with respect to taxation. The powers conferred by s. 51 (ii.) are expressly given " subject to the Constitution "—i.e., subject *inter alia* to the powers conferred by s. 96, which is in this respect unqualified. It could not therefore be a sound objection to an otherwise valid exercise of power under s. 96 that it operated—in conjunction with an otherwise valid exercise of power under s. 51 (ii.)—to produce an economic result not permitted under the taxing power alone. Under s. 96 indeed, discriminations between States are allowed, indeed designed, to adjust inequalities arising from the operation of a uniform Federal law—e.g., a taxing law—because of the unequal wealth and development of those States.

Evatt J., in a dissenting judgment, held that on its true construction s. 96 could not authorize a contravention of the express prohibitions in the constitution. But in any case he held that in substance s. 14 of the W.I.A.A. was not an exercise of power under s. 96 at all, but a law refunding taxation, and therefore as plainly a law with respect to taxation as if it had been expressly included among the provisions of the Assessment Act authorizing the refunds.

The members of the Court were thus divided on that most fruitful of sources of contention—the true nature or substance of the legislation in question. The whole Court was agreed that it was permissible to read each of the Commonwealth Acts with the others and in the light of the

5. S. 51 (ii)—" The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to :—(ii) Taxation ; but so as not to discriminate between States or parts of States."
6. S. 96—" During a period of 10 years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit."
7. Latham C.J., Rich, Starke and McTiernan JJ., (Evatt J. dissenting).

" scheme " as a whole. It was agreed also that in determining the substance of the W.I.A.A. regard should be had to the proceedings at the conference at which the scheme was formulated. Evatt J. went further, and supported his view of what s. 14 in substance did by extraneous material such as telegrams passing between the respective governments. But in the view of the majority this was to assign a law to a particular category by reason of its purpose or motive or economic effect rather than by reason of the rights and duties it delimits.

In the view of the majority, no question of severability arose. Starke J. based his decision on the view that s. 14 of the W.I.A.A. was clearly severable, even if invalid, and therefore found it unnecessary to decide the true character of s. 14 itself. Evatt J., on the other hand, having held s. 14 invalid, had to consider whether it could be severed from the rest of the scheme. He held it could not. But since the enactment in 1930 of s. 15A of the Acts Interpretation Act, it appears that a whole scheme is invalidated only where the remaining Acts are so dependent on the invalid one that they cannot stand alone as a valid exercise of power; for s. 15A provides: " Every Act . . . shall be read and construed . . . so as not to exceed the legislative power of the Commonwealth . . . and shall be a valid enactment to the extent to which it is not in excess of that power." Evatt J. relied on a High Court decision[8] that s. 15A did not apply to save schemes which are diverted by the omission of the invalid part from one purpose to another. But s. 15A would appear to be almost meaningless if it were not to apply to a case where the remainder of an Act is, despite the omission of the invalid parts, intrinsically complete and a substantially identical enactment with respect to the subject-matter.[9] On this view the taxing Acts here would seem to be a valid exercise of power, even if s. 14 of the W.I.A.A. were held invalid.

The question also arose whether the Tasmanian Act could be read with the Commonwealth Acts. All the justices read the Commonwealth Acts together. But Evatt J. also read the Tasmanian Act with the Commonwealth Acts, and this assisted his conclusion that the scheme operated to impose discriminatory taxation contrary to s. 51 (ii). The majority regarded the Tasmanian Act as part of the scheme, but refused to read it with the Commonwealth Acts in the absence of any express reference in the latter, regarding it as too bold a venture to read together Acts of two legislative authorities so that Commonwealth Acts, otherwise valid, are rendered invalid by the operation of a State Act; any discrimination, they said, arose only by virtue of the Tasmanian Act, to which s. 51 (ii) did not apply.

At first sight this decision may seem to overrule *R. v. Barger*[10]. There a Commonwealth Act, passed as an exercise of the excise power, was held invalid as being in substance, by reason of exemptions in respect of goods produced under certain approved conditions, an Act regulating labour conditions within a State. Here an Act was passed as an exercise of powers conferred by s. 96, and held valid, though operating to produce the same result as a discriminatory taxing scheme. However the two cases are reconcilable because here the Commonwealth Act was held to

8. *Australian Railways Union v. Victorian Commissioner for Railways*, (1930) 44 C.L.R. 319.
9. Cf. *Huddart Parker v. Commonwealth*, (1931) 44 C.L.R. 492.
10. (1908) 6 C.L.R. 41.

be in substance a grant of financial assistance, achieving no more and not purporting to refund taxation; it was only by invoking the co-operation of another legislative body that the taxes were refunded.

The question whether s. 6 of the W.I.A.A. was in substance a grant of financial assistance to a State deserves close consideration. By its title it was, but that is not conclusive. It is arguable that under s. 6 the recipient of assistance is not the State but the wheat-growers. But s. 96 enables Parliament to impose conditions, and this may be a sufficient answer.

An appeal by the defendant was dismissed by the Privy Council.[11] Their Lordships took the same general view as the majority, both of the relation between s. 51 (ii) and s. 96, and of the real character or substance of the legislation in question. But they nevertheless agreed with the dissentient that the Commonwealth cannot so use its powers under s. 96 so as altogether to nullify the prohibition contained in s. 51 (ii). On the question of severability they expressed no opinion.

—H. L. PERKINS.

11. [1940] 3 All E.R. 269.

RECOGNITION IN INTERNATIONAL LAW.[1]

Haile Selassie v. Cable & Wireless, Ltd.[2]

The Italian annexation of Ethiopia has led to some interesting decisions by English Courts involving points of international law.

Haile Selassie v. Cable & Wireless, Ltd. raises questions relating both to the impleading of a foreign sovereign and to the legal status of sovereigns *de facto* and *de jure*. In this case the exiled Emperor of Ethiopia, who at that time was still recognized by the British Government as *de jure* sovereign of Ethiopia, claimed from the defendant company a balance due under a concessionary contract entered into in 1934 with a department of the Ethiopian government representing the plaintiff in his capacity of sovereign of Ethiopia. The defendant company admitted the sum due from them, but produced letters from the Italian Ambassador in London in which the Italian government claimed the money and also refused to have its claim determined in the English Courts. The defendants argued that the King of Italy, by virtue of his recognition as *de facto* sovereign of Ethiopia, had acquired the right to the money, and that therefore payment to Haile Selassie would not discharge the debt. Bennett J. declined to express an opinion on the question of law thus raised. He held that the action must be stayed because "the right of the plaintiff to recover judgment cannot be determined without determining whether the claim put forward by or on behalf of His Majesty the King of Italy is well founded."

The plaintiff appealed against this decision, contending that property in regard to which a foreign sovereign was entitled to claim immunity must be actually or notionally in his possession. The authorities upon

1. The writer gratefully acknowledges the assistance he has derived in preparing this note from discussion with the class in International Law.
2. [1938] Ch. 545, 839; [1939] Ch. 182.