[HIGH COURT OF AUSTRALIA.]

H. L. D'EMDEN . . . . . APPELLANT;
DEFENDANT,

AND

F. PEDDER . . . . . RESPONDENT;
COMPLAINANT.

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A. 1904.

Feb. 24.

Griffith, C.J., Barton and O'Connor, JJ.

Extent of Commonwealth authority in matters placed by the Constitution within its jurisdiction—Power of States to control Commonwealth agencies—Construction of State Act which may have the effect of fettering such agencies—Commonwealth Constitution, secs. 52 (ii.), 107-109, 114—Applicability of American decisions in construction of Commonwealth Constitution—Commonwealth Audit Act (No. 4 of 1901)—Tasmanian Act (2 Edw. VII., No. 30)—Effect of Appropriation Act.

The Commonwealth and the States are, with respect to the matters which under the Constitution are within the ambit of their respective legislative or executive authority, sovereign States, subject only to the restrictions imposed by the Imperial connection and the provisions of the Constitution, either expressed or implied. Where, therefore, the Constitution makes a grant of legislative or executive power to the Commonwealth, the Commonwealth is entitled to exercise that power in absolute freedom, and without any interference or control whatever except that prescribed by the Constitution itself.

If a State attempts to give its legislative or executive authority an operation which if valid would interfere to any, the smallest, extent, with the free exercise of the legislative or executive power of the Commonwealth, the attempt unless expressly authorized by the Constitution is invalid and inoperative.

In interpreting the Commonwealth Constitution, it is reasonable to infer that where the framers of that instrument inserted provisions indistinguishable in substance, though varied in form, from the provisions of other legislative enactments which have received judicial interpretation, they intended that such provisions should receive the like interpretation.

General words in a State Act should if possible be so construed that the application of the Act will not infringe the Commonwealth Constitution.

H. C. OF A. 1904.

D'EMDEN v. PEDDER.

Tasmanian Act (2 Edw. VII., No. 30) which prescribes *inter alia*, that from 1st January, 1903, there shall be levied in respect of . . . . every receipt where the sum received amounts to £5 and under £50 . . . . a stamp duty of 2d., must be construed so as not to apply to a receipt given by a federal officer in Tasmania for his salary, such receipt being required to be given by the Commonwealth law and practice regulating the department to which the officer belongs.

Such a receipt is not the property of the Commonwealth, in such a sense as to bring it within the words of sec. 114 of the Commonwealth Constitution, which prohibits the taxation of Commonwealth property by the States.

Although the stamp tax levied by Tasmanian Act 2 Edw. VII., No. 30, if imposed on receipts given by a federal officer for salary, would in substance amount to a diminution of the officer's salary, the Act by which it is levied is not on that account inconsistent with the Federal Appropriation Act in which such salary is voted. The effect of an Appropriation Act is not to fix salaries, but to authorize the payment for salaries and other purposes of sums not exceeding those specified in the Act.

The appellant, D'Emden, was Deputy Postmaster-General of the State of Tasmania, and as such was an officer in the Public Service of the Commonwealth of Australia. The respondent, Pedder, was a Superintendent of Police in the Public Service of the State of Tasmania. On 3rd June, 1903, the appellant was summoned to appear before the Court of Petty Sessions in Hobart, on an information preferred by the respondent, under sec. 5 of Act 2 Edward VII., No. 30, of the State of Tasmania. The information alleged that defendant "did on the 31st March, 1903, in Tasmania aforesaid give to the paying officer of the Commonwealth of Australia a receipt liable to duty, to wit a receipt for the sum of £41 9s. 8d. for salary and wages due from the said Commonwealth to the said H. L. D'Emden for the period from the 1st to the 31st day of March, 1903, the said receipt when so given by the said H. L. D'Emden as aforesaid not being duly stamped." Defendant was convicted, and ordered to pay a fine of 1s. and costs and in default to be imprisoned for seven days.

From this decision defendant appealed to the Supreme Court of Tasmania: a case being stated by the magistrates, on his application, pursuant to Act 24 Vict., No. 5, sec. 1. The case, after setting out the facts above mentioned, proceeded:—"The said appellant pleaded not guilty, admitted the truth of the allegations in the said information but contended that the stamp duty is not payable under the State Acts either by the Commonwealth or by

individuals in respect of any documents which are part of any transaction between the Commonwealth and any other party for the purpose of conducting the public business of the Commonwealth. We, however, being of opinion that such stamp duty is so payable, gave our determination against the appellant in the manner before stated. The question of law arising on the above statement for opinion of the Court therefore is—Is stamp duty payable under the Act of the State of Tasmania, 2 Edw. VII., No. 30, by the appellant in respect of a receipt given by him in Tasmania to the paying officer of the Commonwealth of Australia for his salary for a given period as an officer of the Civil Service of the Commonwealth of Australia stationed in Tasmania."

On September 18th, 1903, the case was heard before the Full Court (*Dodds*, C.J., *Clark*, J., and *McIntyre*, J.) By a majority, *Dodds*, C.J., and *McIntyre*, J., (*Clark*, J., dissenting), it was held that the appellant was liable to pay the duty, under the State *Stamp Act*, in respect of the receipt in question, and the conviction was affirmed.

From this decision the defendant now appealed to the High Court.

Drake, A.G. of the Commonwealth (with him *Sir Eliott Lewis*), for appellant (defendant). The question to be decided here is whether the receipt given by the appellant, under the circumstances set out in the special case, is liable to stamp duty. All the facts are admitted. The Post and Telegraph Department, of which appellant is an officer, was transferred to the Executive Government of the Commonwealth on March 1st, 1901, by a proclamation under sec. 69 of the Constitution. The department thereupon became subject to the exclusive legislative control of the Parliament of the Commonwealth (see sec. 52, sub-sec. ii., of the Constitution). Laws have been passed by the Commonwealth Parliament for its regulation—among others, the *Post and Telegraph Act* (No. 12 of 1901) and the *Audit Act* (No. 4 of 1901). Appellant holds his office subject to the provisions of these Acts, and receives the salary which is voted for such office by the Federal Parliament. It is contended on behalf of the appellant—

(1) That this officer is a federal agency or instrumentality, and

H. C. OF A. 1904.

D'EMDEN v. PEDDER.

gave this receipt in the performance of his duty as a federal agent; and that the tax sought to be imposed upon this receipt is a tax upon the operations, instrumentalities, and agencies of the Commonwealth, and, as such, it is by necessary implication forbidden by the Constitution.

(2) That the State *Stamp Act*, so far as it purports, or may be construed to affect the salary of an officer of the Federal Government, or the receipt in this case—

(*a*) Is inconsistent with the Act of the Federal Parliament which fixes and provides the salary, and, to the extent of such inconsistency, is invalid under sec. 109 of the Constitution;

(*b*) Attempts to impose a condition which must be complied with by the officer before he can receive the salary voted to him by the Federal Parliament, and no such condition can be constitutionally imposed by the State Parliament.

(3) That the State Act, so far as it may be construed to extend to the receipt in this case, is an Act relating to a department of the Commonwealth, the control of which is, by the Constitution, transferred to the Executive Government of the Commonwealth, and is, therefore, unconstitutional, as encroaching upon the exclusive legislative power of the Commonwealth, conferred by sec. 52, sub-sec. 2, of the Constitution.

4. That this duty, so far as it purports to relate to receipts given by the Commonwealth, is a tax upon the property of the Commonwealth, and is, therefore, unconstitutional by reason of sec. 114 of the Constitution.

American cases are useful in interpreting our Constitution, which, like that of the United States, is one of enumerated powers. The relations between the Federal and State authorities are similar. As far as implied legislative powers are concerned, the words of our Constitution are broader. In that of the United States, Congress is given power to pass all laws "necessary and proper" for carrying into execution its legislative powers. In our Constitution, the words used are "matters incidental to."

[GRIFFITH, C.J.—"Necessary and proper" implies whatever is, in the opinion of the legislature, the most convenient. The words are the same in effect as "incidental to."]

Where there is a difference between the two Constitutions, it is that the subjection of State laws to federal laws is more explicit in the Australian Constitution; and, further, many of the powers implied in the United States Constitution are expressed in ours. [See Clause V. of the *Commonwealth of Australia Constitution Act*, corresponding to Art. VI. (2) of the United States Constitution; secs. 106-109 of the Constitution, and also the 10th amendment of the United States Constitution.] In one of the most important of these, *McCulloch* v. *The State of Maryland*, (1819) 4 Wheat., 316, it is laid down by *Marshall*, C.J., at pp. 405, 406, that, in applying the Constitution to cases not expressly provided for, we must have recourse to the interpretation of the Constitution as a whole. This applies in considering any question as to the relation of Federal and State powers.

[O'CONNOR, J.—The United States Constitution contains no such provisions as those in secs. 106-109 of our Constitution. The only provision on the subject in the former is that which provides for the supremacy of the Constitution and laws of the United States (Art. VI., 2). It was therefore necessary in the United States for the Courts to lay down general principles as to the relations of the two powers. But may it not be that, as those relations are more precisely defined in our Constitution, the sections referred to (106-109) provide a sufficient line of demarcation, and that any State law which does not conflict with the express provisions of Commonwealth law must be held good? In that case there would be no necessity to have recourse to the principles as to the relations between Federal and State authorities which have been laid down in the United States.]

The words "law of the Commonwealth" as used in sec. 109 of the Constitution, include the Constitution itself, and all that is implied by the Constitution as to the relations between the State and Federal powers. If a power assumed by a State is inconsistent with a power which is necessarily implied by the Commonwealth Constitution or laws, it is void.

[GRIFFITH, C.J.—If the doctrine as to the relation between Federal and State powers laid down in *McCulloch* v. *Maryland* (*ubi supra*) applies, sec. 109 of the Constitution would appear to be unnecessary. It seems to have been inserted in order to

H. C. OF A. 1904.

D'EMDEN v. PEDDER.

remove doubts that arise from the grant of concurrent powers to the Federal and State authorities in some cases.]

It was open to the framers of the Constitution to expressly negative the application of the principles of *McCulloch* v. *Maryland*. If, with this interpretation of the United States Constitution before them, they did not do this, they may be taken to have intended that the doctrine of the supremacy of Federal law was to apply to the implied powers of the Federation, as well as to the express laws.

This officer is a federal agency or instrumentality.

[O'CONNOR, J.—What do you mean by instrumentality? Is it different from "agency"?]

It is used in American cases to signify any corporate body, person, or building used for the purpose of carrying on the government of the country. Agency implies the employment of a person.

[GRIFFITH, C.J.—It may be important to consider whether this stamp duty is a tax on a person or on an instrument. In England the general rule is that stamp duty is not payable except on instruments, and, therefore, if you can make and carry out a contract without using an instrument, you escape stamp duty.]

That dilemma is for the other side to solve. Whether on the person or on the instrument, the tax is unconstitutional. If it is regarded as a tax on the officer's salary, of the same kind as an income tax, then it is a tax on the federal agency, for the officer is bound to pay it himself, and may, under the *Stamp Act*, be punished for a failure to do so. If on the other hand, it is regarded as a tax on the receipt, then the receipt being a document which is used by the Federal Government in the conduct of its business, the tax is imposed upon a federal instrumentality. In either case, it is impliedly forbidden by the Constitution.

[GRIFFITH, C.J.—It may be a tax on the instrument without being a tax on the property of the Commonwealth within the meaning of sec. 114 of the Constitution.]

The Court will look at the real effect of the tax, and not merely at the words of the Statute, in determining its constitutionality; *Almy* v. *California*, (1860) 24 Howard, 169. The principle governing this case was first laid down in *McCulloch* v.

Maryland, (1819) 4 Wheat., 316, at p. 429. "The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not." And again, at p. 430, "We find then on just theory a total failure of this original right to tax the means employed by the government of this union for the execution of its powers." See also pp. 431, 432. And at p. 436, the principle is again stated—"The States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the Constitutional laws enacted by Congress to carry into execution the powers vested in the general government."

[GRIFFITH, C.J.—The argument in *McCulloch* v. *Maryland* applies to the taxation of an instrument, and not of a person.]

The principle is the same. If the tax is on an officer, it impedes or controls the operation of a law enacted by the Parliament for carrying into execution its powers. The degree of interference does not matter.

[BARTON, J.—There does not appear to be any reason why, if this stamp tax is constitutional, it should be limited to receipts given by federal officers.]

If the power exists, there is no limit to its exercise, and Federal agencies might be seriously hampered. *Dodds*, C.J., in his judgment stated that the general principles laid down in *McCulloch* v. *Maryland* have been modified by later decisions. The principle of that case is absolutely unimpaired: it is relied on in a long series of cases extending up to the present time. In *Osborn* v. *Bank of United States*, (1824) 9 Wheat., 738, counsel for appellant expressly asked the Court to reconsider its decision in *McCulloch* v. *Maryland* (see p. 765), but the Court reaffirmed the principle there laid down (pp. 860, 861). In these cases, the tax was imposed by a State on the National Bank. The present case is stronger. The principle is again affirmed in *Weston* v. *City of Charleston*, (1829) 2 Peters, 449, in which was considered the validity of an attempt to tax stock of the United States *Marshall*, C.J., points out (p. 465) that

H. C. OF A. 1904.

D'EMDEN v. PEDDER.

"if the right to impose the tax exists, it is one which in its nature acknowledges no limits." See also *Bank of Commerce* v. *New York City*, (1862) 2 Black, 620. The question does not depend on the effect of the tax.

[BARTON, J., referred to *Railroad Company* v. *Peniston*, (1873) 18 Wall., 5.]

That case was relied on by the Chief Justice of Tasmania to support the proposition that the constitutionality of a State tax on federal instrumentalities depended upon the effect of the tax; that is, upon the question whether the tax did in effect impair the usefulness of the instrumentality. That is a misapprehension of the case. There the tax was on the property of a corporation which, though it performed certain duties for the Federal Government, existed primarily for the purpose of private gain. There is a clear distinction laid down in the judgment between taxation of the property of a federal agency and the taxation of its operations. The former is valid, if it does not impede or burden the agent in the performance of his duties to the Federal Government, but not otherwise. Taxation of the operations of the agent is in every case unconstitutional. The decision in question cannot mean that the validity of any tax upon federal agencies is a question of fact, viz., whether as a matter of fact the effect of the tax was to impair the usefulness of the federal agent.

[GRIFFITH, C.J.—If that were so, the constitutionality of a Statute might depend on the verdict of a jury, and different juries might give different verdicts.]

This case has been cited (see *Wollaston's Case* (1902), 28 V.L.R., 357; 24 A.L.T., 63) as impairing the principle of *McCulloch* v. *Maryland*. On the contrary, it strongly reaffirms it.

[GRIFFITH, C.J.—There is no doubt thrown upon the principle, all that was decided in *Peniston's Case* was that it did not apply.]

Another case in which the Court held that the principle of *McCulloch* v. *Maryland* was inapplicable is *Thomson* v. *Pacific Railroad*, (1869) 9 Wall., 579. But in that case the corporation which claimed exemption from State taxation was one which held its franchise under State law, although it performed services for the Federal Government. Moreover, the tax in that case was

a tax on property, which, as is admitted in *McCulloch* v. *Maryland*, is not necessarily exempted. But the case does not in any degree impair the principle that the operations of a federal agent cannot be taxed. Nor does *Central Pacific Railway* v. *California*, (1895) 162 U.S.R., 91, which was also relied on in *Wollaston's Case* (*supra*). In *National Bank* v. *Commonwealth*, (1869) 9 Wall., 353, it was made clear that, whatever might be the nice dividing line as to taxation of the property of federal agents, there is no doubt whatever as to the exemption of the operations of federal agencies or instrumentalities (see *Railroad Co.* v. *Peniston*, *supra*, at p. 36). The fact that Congress has legislated with regard to this subject may have given rise to misapprehension as to the maintenance of the principles of *McCulloch* v. *Maryland*. The history of this legislation is given in *Owensboro' National Bank* v. *Owensboro'*, (1898) 173 U.S.R., 664, at p. 668. But this legislation did not affect the principle: it merely prescribed rules as to the method.

[GRIFFITH, C.J.—Congress could not confer a new power of taxation on the States. The effect of the legislation was to declare that, for the purpose of the exercise of the existing powers of State taxation, certain matters should not be regarded as agencies or instrumentalities of the United States. So the taxation of them would be unconstitutional.]

It was argued in *Wollaston's Case* (*supra*) and assumed by the Chief Justice of Tasmania that the applicability of the principle of *McCulloch* v. *Maryland* to our Constitution was negatived by the decision of the Privy Council in *The Bank of Toronto* v. *Lambe* (1887), 12 App. Ca., 575. But that was a case of a direct conflict between the legislative powers of the Dominion and the Provinces, arising out of the words of the *British North America Act*. There was no question of the Bank being a federal agency. The only question decided was that the power of direct taxation is a power which, under sec. 92 of the *British North America Act*, belongs exclusively to the provincial legislatures, and that that power could not be cut down because of the possibility of its abuse. It has no application to cases of the kind now before the Court.

[GRIFFITH, C.J.—The decision in the case of *The Bank of*

H. C. OF A. 1904.

D'EMDEN v. PEDDER.

Toronto v. *Lambe* merely amounts to this—that under sec. 92 the Provinces have the power of direct taxation.]

Counsel for the Bank raised the question that the power to tax involves the power to destroy, and on that Lord *Hobhouse* made some observations (p. 586) which have been misapprehended.

[GRIFFITH, C.J.—Lord *Hobhouse* pointed out clearly that the case of *McCulloch* v. *Maryland* had nothing to do with the question.]

Another point raised in *Wollaston's Case* was, that the principles of *McCulloch* v. *Maryland* and other American cases did not apply here, because under our Constitution, any conflict between the powers of the State and Commonwealth can be avoided by the power of the Crown to refuse its assent to any State Act which infringes Commonwealth powers.

[O'CONNOR, J.—That argument assumes that the British Government is in a position to judge whether an Australian State law is constitutional or not.]

Yes. The Secretary of State could not be asked to disallow a State Act on the ground that it might be unconstitutional if a certain interpretation were placed upon it. The argument would make the Secretary of State for the Colonies the interpreter of the Constitution instead of this Court. It was advanced in in the cases of *The Attorney-General for Quebec* v. *The Queen Insurance Co.*, (1878) 3 Ap. Cas., 1090; and also in *The Attorney-General for Quebec* v. *Reed*, (1884) 10 Ap. Cas., 141. But in neither case did the Privy Council notice the argument in their judgment. It has been attempted to support it by reference to Lord *Hobhouse's* words at p. 587 of *Bank of Toronto* v. *Lambe* (12 Ap. Cas.):—"Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated colonies a carefully balanced Constitution, under which no one of the parts can pass laws for itself except under control of the whole acting through the Governor-General." But this observation was made with regard to a question entirely different

from the one raised here, and the words used are only words of description.

[GRIFFITH, C.J.—The observation of Lord *Hobhouse* is perfectly true, but the application of it to such a case as that now under consideration is not plain, and was probably not contemplated by his Lordship.]

It does not justify the inference that the principle of *McCulloch* v. *Maryland* is inapplicable because of the Crown's power of veto. [He also referred to *Home Insurance Co.* v. *New York State*, (1890) 134 U.S.R., 594; and *Owensboro' National Bank* v. *Owensboro'*, *supra*, as showing that the principle of *McCulloch* v. *Maryland* remained unimpaired down to 1898]. There is another class of cases which supports the principle of *McCulloch* v. *Maryland*, but which also illustrates my second point, viz., that a law of a State is void when it is inconsistent with a constitutional law of the Commonwealth. [He referred to *Dobbins* v. *The Commissioners of Erie County*, (1848) 16 Pet., 435; *Collector* v. *Day*, (1870) 11 Wall., 113; *Pollock* v. *Farmers' Loan and Trust Co.*, (1894) 157 U.S.R., 429; *Fairbank* v. *The United States*, (1900) 181 U.S.R., 283; *Leprohon* v. *Ottawa*, (1878) 2 Ontario App. Cas., 522; *Evans* v. *Hudon*, (1877) 2 Cartwright, 346; *Ex parte Owen*, (1881) 20 New Brunswick R., 487; *Ackman* v. *Town of Moncton*, (1884) 24 New Brunswick R., 103; *Coates* v. *Town of Moncton*, (1885) 25 New Brunswick R., 605; *Ex parte Timothy Burke*, (1896) 34 New Brunswick R., 200; *Ex parte Killam*, *Ex parte McLeod*, *Ex parte Wilkins*, (1898) 34 New Brunswick R., 530.]

As to the second point, the State *Stamp Act*, in so far as it purports to apply to receipts given for federal salaries, is inconsistent with the law of the Commonwealth which fixes such salaries. It is therefore invalid under sec. 109 of the Constitution. Moreover it attempts to impose a condition which must be complied with before the federal officer can receive his salary, and is therefore invalid. The result of this tax is to diminish the officer's salary by the amount of the tax. The Act is therefore inconsistent with the Federal Appropriation Act which fixes his salary.

H. C. OF A. 1904.

D'EMDEN v. PEDDER.

[GRIFFITH, C.J.—But does this tax reduce his salary?]

In effect it does, for it is the officer who must pay it, and on whom a penalty is imposed in default of payment. The Court will look at the real effect of the Act; *Almy* v. *California*, *supra*. This is really an income tax on the salary; as a matter of practice he is compelled to sign the receipt before he gets the salary.

[GRIFFITH, C.J.—May it not be that the Federal Parliament fixed the salary with reference to the local conditions prevailing in the particular State, such as local taxation, house-rent, prices of food and clothing, &c.?]

These things only affect the salary after the officer has received it. The tax must be paid before he receives it. As to the second part of this ground, viz., that this Act imposes a condition which must be complied with before the officer can receive his salary: the *Audit Act* and the practice of the Department make it necessary that the officer should give the receipt before the salary is paid. This receipt is a record of the Department, a purely internal matter of administration. The State cannot impose such a condition.

The third ground of objection is that the Act imposing this tax encroaches upon the exclusive legislative powers of the Commonwealth. In all the American cases in which the question of encroachment upon the exclusive powers of the Federal Government has been raised, the interference has been indirect: the result of legislation directed to some other end. In such cases, the Court has looked to the real effect of the State legislation, and in every case where it involved any encroachment, direct or indirect, on the federal field of legislative power, the State legislation has been held invalid; *Gibbons* v. *Ogden*, (1824) 9 Wheat., 1; *Brown* v. *Maryland*, (1827) 12 Wheat., 419; *Prigg* v. *Pennsylvania*, (1842) 16 Pet., 539; *Almy* v. *California*, (1860) *supra*.

[GRIFFITH, C.J.—In a later case, *Woodruff* v. *Parham*, (1868) 8 Wall., 123, the Court thought that a mistake had been made in the judgment in *Almy* v. *California*.]

Steamship Company v. *Port Wardens*, (1867) 6 Wall., 31; *Cannon* v. *New Orleans*, (1874) 20 Wall., 577; *Henderson* v. *New York*, (1875) 92 U.S.R., 259. None of these cases go so far, in

encroaching on the field of federal legislation, as the present case; for the Department here is, and must be, under exclusive federal control, and this receipt is a departmental record. [He also referred to *In re Debs*, (1894) 158 U.S.R., 564; *Fairbank* v. *United States*, *supra*; *Cook* v. *Pennsylvania*, (1878) 97 U.S.R., 566; *Kentucky* v. *Dennison*, (1860) 24 How., 66; *Cote* v. *Watson*, (1877) 2 Cartwright, 343; *Tennessee* v. *Davis*, (1879) 100 U.S.R., 257 (at p. 263); *In re Neagle*, (1889) 135 U.S.R., 1.]

[O'CONNOR, J.—Do you rest your case on the narrow ground that the appellant was an officer of the Department, or on the broad ground that he performed services for the Commonwealth, just as any contractor does? If you take the latter ground, how do you distinguish a receipt given by this officer from a receipt given by any person who performs a service for and receives payment from the Commonwealth Government?]

The argument would apply to any receipt given in pursuance of the *Audit Act*, whether the person giving the receipt was an officer of the Government, or a mere contractor to perform a special service.

The fourth ground is that the paper on which this receipt is given is the property of the Commonwealth, and the *Stamp Duties Act* imposes a tax upon it. This is forbidden by sec. 114 of the Constitution.

Counsel also cited:—*Harvard Law Review*, November, 1903, p. 57, note on *Northern Pacific Railroad Co.* v. *Townsend*; *Van Allen* v. *Assessors*, (1865) 3 Wall., 573; *Bank of Commerce* v. *New York*, (1862) 2 Black, 620; *Grandall* v. *Nevada*, (1867) 6 Wall., 35; *The Banks* v. *The Mayor*, (1868) 7 Wall., 16; *United States* v. *Railroad Co.*, (1872) 17 Wall., 322; *Delaware Railroad Tax*, (1873) 18 Wall., 206.

Nicholls, A.G. (*Dobbie*, Solicitor-General, with him), for the respondent (complainant). It is admitted that the State governments have no power by taxation or otherwise to retard or burden or in any other manner control the operation of the constitutional laws of the Commonwealth Parliament. The necessary independence of Federal and State governments imposes a limit on the taxing powers of each; *Black's Constitutional Law*, p. 378; *City*

H. C. OF A. 1904.

D'EMDEN v. PEDDER.

and County of San Franscisco v. *Western Union Telegraph Co.*, (1892) 96 Cal., 140. But the doctrine must be taken with limitations, because all State laws may restrict federal agencies, directly or indirectly, *e.g.*, laws imposing a land tax, probate duties, &c. Therefore the question of the degree of interference must be considered; *Railroad Co.* v. *Peniston*, *supra*. The full application of the doctrine of *McCulloch* v. *Maryland* is not necessary here. The tax is not unconstitutional as diminishing his salary. Every tax is a diminution of salary in the sense that it has to be paid out of the taxpayer's salary. But in this case it must be assumed that the Federal Government fixed the officer's salary with reference to local conditions as to taxation, cost of living, &c. A federal officer is expected to discharge his duties as a citizen of his State. Therefore the law imposing this tax is not inconsistent with the *Appropriation Act* which fixes the officer's salary.

[GRIFFITH, C.J.—An Appropriation Act does not fix an officer's salary. It merely places a certain sum at the disposal of the Crown for paying a salary. It confers no right on the officer.]

As to the argument that this tax imposes a condition on the performance of a federal officer's duty, he does not give a receipt as a federal officer, but as a private citizen. He earns his salary as an officer, but receives and enjoys it as a private citizen. For the same reason, this tax does not encroach on the exclusive legislative powers of the Commonwealth. That exclusive power applies only to "matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth" (sec. 52, (ii.) of the Constitution). But this *Stamp Act* only affects what the respondent does as a private citizen. In giving the receipt, he is not serving the Commonwealth, but only dealing with it. The money is only payable when his work as an officer of the Commonwealth is completed. If this tax is properly regarded as a tax upon him in his official capacity then a by-law regulating the speed of bicycles would be an interference with a Federal agent, *e.g.*, a telegraph messenger who used a bicycle in the course of his business.

[GRIFFITH, C.J.—That is a police regulation, and may be supported on that ground.]

If this tax were limited to federal officers it would be unconstitutional. But where it is imposed upon them in common with all the other citizens of the State, it is not such an interference as will render it unconstitutional.

[GRIFFITH, C.J.—Surely the State has power to select the objects of taxation. In the United States, the State Constitutions mostly provide that taxation must be equal and uniform. Here it is not so.]

This is not a tax on the property of the Commonwealth. It is not a tax on the piece of paper, but on the individual. The argument for the appellant seems to assume a fundamental hostility between the obligations of an individual as a citizen of the Commonwealth and as a citizen of a State. This is a wrong view to take of the spirit of the Constitution. Federal obligations were not intended to involve any diminution of an individual's responsibilities as a citizen of his State. The Federal Constitution should be construed in such a way as to give effect to this intention. He referred to *Citizens' Insurance Co.* v. *Parsons*, (1881) 7 App. Cas., 96, at p. 109.

[GRIFFITH, C.J.—Can you point to any distinction between the Australian Constitution and that of the United States which would render the arguments from American cases inapplicable here?]

There is nothing in the United States Constitution to correspond with sec. 107 of the Constitution. Article 10 of the Amendments to the United States Constitution is by no means so definite as to the reservation of State rights.

[GRIFFITH, C.J.—I do not think there is any material difference.]

The language of sec. 107 is more definite, and the contention that the implied powers of the Commonwealth can over-ride State laws seems hardly consistent with it.

[GRIFFITH, C.J.—Another point to be considered is this. The framers of the Australian Constitution had before them decided cases in which certain provisions of the United States Constitution had received definite and settled interpretation. With these cases before them they used in many of the sections of our Constitution almost identical language. Does not this raise a strong presumption that they intended the same interpretation to be placed upon similar words in our Constitution?]

H. C. OF A. 1904.

D'EMDEN v. PEDDER.

Certainly it does; but as far as sec. 107 is concerned, there is no exactly corresponding section in the United States Constitution.

[O'CONNOR, J.—The principles governing the relations of Federation and States in the United States have been laid down by great jurists. Are not the Constitutions sufficiently similar in their language to justify the inference that the same principles were intended to apply here?]

The general applicability of those principles is not questioned, but in this particular case it is not necessary to apply the doctrine laid down in *McCulloch* v. *Maryland* to its full extent.

[GRIFFITH, C.J.—Must not federal officers be regarded as residing, *qua* officers, outside the territorial jurisdiction of a State?]

That principle would exempt them from all State taxation. Every case must be judged on its own facts, and if it appears that the State tax or regulation does not substantially hamper the operations of the federal agent it should be held good. If it only affects him in common with the other citizens of the State, it is not a real interference.

Drake replied.

Sydney, 26th April, 1904.

The judgment of the Court was delivered by

GRIFFITH, C.J. This appeal, although the pecuniary amount at stake is insignificant, involves constitutional questions of great importance. The appellant, who is the Deputy Postmaster-General for the State of Tasmania, was summoned before justices at Hobart on a complaint charging him with giving to the paying officer of the Commonwealth a receipt liable to duty, namely, a receipt for salary due from the Commonwealth to him for the month of March, 1903, such receipt not being duly stamped. The facts were admitted, but the liability of the receipt in question to duty was denied. The justices convicted the appellant, and adjudged him to pay a fine of 1s. and 7s. 6d. for costs, to be levied by distress, and, in default of distress, adjudged him to be imprisoned in the gaol at Hobart with hard labour for seven days. A case was thereupon stated to the Supreme Court of Tasmania,

submitting the question whether stamp duty is payable under the Tasmanian Act (2 Edw. VII., No. 30), by the appellant in respect of a receipt given by him in Tasmania to the paying officer of the Commonwealth, for his salary for a given period as an officer of the Civil Service of the Commonwealth stationed in Tasmania. The Supreme Court, by a majority (*Dodds*, C.J., and *McIntyre*, J.), dismissed the appeal, *Clark*, J., dissenting. The material provisions of the Tasmanian Act are as follows:—Sec. 3 prescribes that from 1st January, 1903, there shall be levied, in respect of the instruments mentioned in the Schedule, the stamp duties therein set down. The Schedule, so far as material, is in these words: "For every receipt where the sum received amounts to £5 and under £50 - - - 2d." Sec. 5 provides that if any person gives a receipt liable to duty not duly stamped he shall be liable on conviction to a penalty not exceeding £5, which, under another Statute, may be enforced by distress or imprisonment.

The main question for determination may be regarded under two aspects—(1) Whether the Tasmanian *Stamp Act* should be construed as applying, in terms, to receipts given by Commonwealth officers for their salary; and (2) if so, whether such a law is within the competence of the State legislature. The greater portion of the argument before us was addressed to the second aspect of the question. It was contended that the Act, if so construed, operates as an interference, by way of taxation and consequent control, with a federal agency or instrumentality; that it attempts to impose a condition which must be complied with by the officer before he can receive the salary allotted to him by the Commonwealth; and that such a condition cannot be constitutionally imposed by a State; that the imposition of a stamp duty on a receipt for a federal salary is, in effect, taxation of the federal salary, which taxation, it was urged, was not within the competence of the State; that the receipt is the property of the Commonwealth, and, therefore, not taxable; and, further, that the Act, so construed, would be inconsistent with the Federal Appropriation Act, by which, it was said, the officer's salary was fixed.

With regard to the last contention it is sufficient to point

H. C. OF A. 1904.

D'EMDEN v. PEDDER.

out that it is not the Appropriation Act which actually fixes the salaries of public officers. They are not mentioned in the Act. Its operation is rather to authorize the payment, for salaries and other purposes, of sums not exceeding those specified in the Schedules to the Act, which include in a lump sum the total anticipated expenditure under the several divisions and subdivisions. The salaries which it is proposed to pay are specified in the Estimates and voted in Committee of Supply. But we agree in the contention that, in considering the validity of legislation under the Constitution, the substance and not the form of the legislation is to be regarded, and that the stamp duty in question is, in substance, a diminution *pro tanto* of the remuneration of the federal officer, just as a tax on bills of lading for goods exported is in substance an export tax on the export of the goods themselves. With regard to the contention that the receipt in question is exempt from State taxation under sec. 114 of the Constitution, as being property of the Commonwealth, we think that the receipt, although undoubtedly it may be described as the property of the Commonwealth for the purposes of a prosecution —say, for stealing—is not property of the kind intended in that section, which appears rather to refer to taxation imposed upon property *qua* property.

We pass to the other grounds for the contention that the law is not within the competence of the State Legislature. The Commonwealth *Audit Act* 1901 (No. 4 of 1901) makes provision for the collection and payment of public moneys, and the audit of public accounts, By sec. 34, sub-sec. 6, it is enacted that " . . . at the time of paying any account every public accountant shall obtain a receipt under the hand of the person to whom the same is payable, or under the hand of some person or banker authorized in writing by such-mentioned person for the amount so paid." Sec. 46 provides that "no sum shall be allowed in any account to have been duly received or paid without a written voucher for the actual receipt or payment of every sum so claimed to be allowed" unless by special order of the Governor-General. The paying officer is a "public accountant" within the meaning of the Act. It is, therefore, part of his duty to obtain a receipt, as it is part of the duty of the officer receiving

his salary to give a receipt; and the receipt, when given, becomes a necessary part of the Commonwealth accounts for audit purposes, and a record of the department of the Commonwealth charged with the duty of making the payment. These provisions as to receipts and vouchers obviously relate to the conduct of the departmental affairs of the Commonwealth Government, and therefore, so far as the Postal Department is concerned, they fall within the words of sec. 52 of the Constitution, by which the Federal Parliament has exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to—"II. Matters relating to any department of the public service the control of which is by the Constitution transferred to the Executive Government of the Commonwealth." The Department of Posts and Telegraphs was transferred to the Commonwealth, under the powers conferred by sec. 69, on 1st March, 1901. It was not disputed by the respondent's counsel that the exclusive power of the Federal Parliament extended to authorize the enactment of these provisions; but it was said that the powers reserved to the States by sec. 107 of the Constitution extended to direct taxation, that the imposition of stamp duty upon receipts given on the payment of money is an ordinary form of direct taxation, that a federal officer giving such a receipt for his salary is in no different position from any other recipient of money from a debtor in the State, and that the provisions of the Constitution as to the exclusive authority of the Commonwealth Parliament ought to be read subject to this power of the States, whether regarded as a power expressly reserved, or as one impliedly reserved from the nature and necessity of the case.

In considering the respective powers of the Commonwealth and of the States it is essential to bear in mind that each is, within the ambit of its authority, a sovereign State, subject only to the restrictions imposed by the Imperial connection and to the provisions of the Constitution, either expressed or necessarily implied. That this is so as regards the Commonwealth, apart altogether from the express provisions of the Constitution, appears too plain to need elaborate argument. It is only necessary to mention the maxim, *quando lex aliquid concedit, concedere videtur et illud sine quo res ipsa valere non potest.* In other

H. C. OF A. 1904.

D'EMDEN v. PEDDER.

words, where any power or control is expressly granted, there is included in the grant, to the full extent of the capacity of the grantor, and without special mention, every power and every control the denial of which would render the grant itself ineffective. This is, in truth, not a doctrine of any special system of law, but a statement of a necessary rule of construction of all grants of power, whether by unwritten constitution, formal written instrument, or other delegation of authority, and applies from the necessity of the case, to all to whom is committed the exercise of powers of government.

And, without recourse to this doctrine of universal application, the express terms of the Constitution lead to the same conclusion. The words of sec. 51, "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" the several matters enumerated, are not used for the first time in that instrument. The same, or almost exactly similar, words were used in the Constitutions of the Australian and Canadian Colonies, and it has always been held that under the authority conferred by them the colonial legislatures had within the territory subject to their jurisdiction sovereign authority, absolute and uncontrolled except so far as it was restricted by the Constitution itself. See *Powell* v. *Apollo Candle Co.*, (1885) 10 App. Cas., 282. Now, when a particular form of legislative enactment which has received authoritative interpretation, whether by judicial decision or by a long course of practice, is adopted in the framing of a later Statute, it is a sound rule of construction to hold that the words so adopted were intended by the legislature to bear the meaning which has been so put upon them. This consideration alone is sufficient to show that the Commonwealth has, with respect to all matters enumerated in the Constitution as within the ambit of its authority, sovereign power, subject only to the limitations already mentioned. But a right of sovereignty subject to extrinsic control is a contradiction in terms. It must, therefore, be taken to be of the essence of the Constitution that the Commonwealth is entitled, within the ambit of its authority, to exercise its legislative and executive powers in absolute freedom, and without any interference or control whatever except that prescribed by the

Constitution itself. There is, however, a large class of cases with respect to which a similar power is for a time reserved to the States. With respect to these matters there is, consequently, a possibility of conflicting legislation. This contingency is dealt with by sec. 109 of the Constitution, which provides that when a law of a State is inconsistent with a law of the Commonwealth the latter shall prevail, and the former shall to the extent of the inconsistency be invalid. This sentence may be thus expanded, supplying the *verba subaudita*: "When a law of a State otherwise within its competency is inconsistent with a law of the Commonwealth on the same subject, such subject being also within the legislative competency of the Commonwealth, the latter shall prevail." With respect, however, to matters within the exclusive competence of the Federal Parliament no question of conflict can arise, inasmuch as from the point at which the quality of exclusiveness attaches to the federal power the competency of the State is altogether extinguished. It follows that when a State attempts to give to its legislative or executive authority an operation which, if valid, would fetter, control, or interfere with, the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent invalid and inoperative. And this appears to be the true test to be applied in determining the validity of State laws and their applicability to federal transactions.

We have had the benefit of considering numerous decisions of the Supreme Court of the United States of America upon analogous questions arising under the United States Constitution, beginning with the celebrated case of *McCulloch* v. *Maryland* (4 Wheat., 316), decided in 1819, in which Chief Justice *Marshall*, delivering the unanimous judgment of the Court, enunciated the doctrines which have ever since been accepted as establishing upon a firm basis the fundamental rules governing the mutual relations of that great Republic and its constituent States. The Attorney-General for Tasmania did not, indeed, suggest that that case was not good law in the United States, but he endeavoured to distinguish the provisions of the United States Constitution from those of the Constitution of this Commonwealth by referring to secs. 107, 108, and 109 of the Constitution. He was not, however,

H. C. OF A. 1904.

D'EMDEN v. PEDDER.

able to point out any material difference between the provisions of those sections and the provisions of the Tenth Amendment of the United States Constitution. And we are equally unable to discover any such difference. Some cases were cited to us in which it has been suggested that decisions upon the construction of the United States Constitution afford no guidance in the construction of other Federal Constitutions, such as that of the Canadian Dominion and that of this Commonwealth. In the case of *Bank of Toronto* v. *Lambe* (12 A.C., 575) in which the case of *McCulloch* v. *Maryland* had been cited before the Judicial Committee of the Privy Council, the committee, so far from depreciating the authority of that case, intimated their willingness to follow the guidance of the great American Chief Justice in a similar case, but pointed out that the principles laid down in *McCulloch* v. *Maryland* threw no light on the question then before them, which was whether a particular form of taxation fell within the express words of the Dominion Constitution, by which the exclusive power to impose direct taxation was conferred upon the provincial legislatures. It is not easy, indeed, to discover the purpose for which *McCulloch* v. *Maryland* was there cited. We are not, of course, bound by the decisions of the Supreme Court of the United States. But we all think that it would need some courage for any Judge at the present day to decline to accept the interpretation placed upon the United States Constitution by so great a Judge so long ago as 1819, and followed up to the present day by the succession of great jurists who have since adorned the Bench of the Supreme Court at Washington. So far, therefore, as the United States Constitution and the Constitution of the Commonwealth are similar, the construction put upon the former by the Supreme Court of the United States may well be regarded by us in construing the Constitution of the Commonwealth, not as an infallible guide, but as a most welcome aid and assistance.

There is, indeed, another consideration which gives additional weight to the authority of the United States decisions with regard to matters in which the two Constitutions are similar. We have already, in discussing the language of sec. 51 of the Constitution, referred to the inference to be drawn from the fact

that a legislature has deliberately adopted in its legislation a form of words which has already received authoritative interpretation. We cannot disregard the fact that the Constitution of the Commonwealth was framed by a Convention of Representatives from the several colonies. We think that, sitting here, we are entitled to assume—what, after all, is a fact of public notoriety—that some, if not all, of the framers of that Constitution were familiar, not only with the Constitution of the United States, but with that of the Canadian Dominion and those of the British colonies. When, therefore, under these circumstances, we find embodied in the Constitution provisions undistinguishable in substance, though varied in form, from provisions of the Constitution of the United States which had long since been judicially interpreted by the Supreme Court of that Republic, it is not an unreasonable inference that its framers intended that like provisions should receive like interpretation.

We should be prepared, therefore, if it were necessary, and if we found ourselves unable otherwise to come to a clear conclusion, to accept the doctrines laid down in the judgment of the Supreme Court of the United States, delivered by *Marshall*, C.J., in *McCulloch's Case*, in 1819 (and since that time often spoken of by that Court as axiomatic), as applicable to the interpretation of the Constitution of the Commonwealth. "The people of a State give to their government a right of taxing themselves and their property, and, as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of a State to tax them sustained by the same theory. Those means are not given by the people of a particular State, not given by the constituents of the legislature, which claims the right to tax them, but by the people of all the States. They are given by all, for the benefit of all; and, upon theory, should be subjected to that government only which belongs to all. It may be objected to this definition, that the power of taxation is not confined to the people and property of a State. It may be exercised upon every object

H. C. OF A. 1904.

D'EMDEN v. PEDDER.

brought within its jurisdiction. This is true. But to what source do we trace this right? It is obvious, that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident. The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution power conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given to the people of a single State. They are given by the people of the United States, to a government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently, the people of a single State cannot confer a sovereignty which will extend over them. If we measure the power of taxation residing in a State, by the extent of sovereignty which the people of a single State possess, and can confer on its government, we have an intelligible standard applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a State unimpaired; which leaves to a State the command of all its resources, and which places beyond its reach all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the Constitution,

is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give. We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed, and the question whether it has been surrendered, cannot arise. But, waiving this theory for the present, let us resume the inquiry, whether this power can be exercised by the respective States, consistently with a fair construction of the Constitution? That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word "confidence." Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which would banish that confidence which is essential to all government. But is this a case of confidence? Would the people of any one State trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This then, is not a case of confidence, and we must consider it as it really is. If we apply the principle for which the State of Maryland contends to the Constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the States. The American people have declared their Constitution, and the laws made in pursuance thereof, to be supreme; but

H. C. OF A. 1904.

D'EMDEN v. PEDDER.

this principle would transfer the supremacy, in fact, to the States. If the States may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the customs house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States."

The learned judges who formed the majority of the Supreme Court seem to have been under the impression that the doctrine of *McCulloch's Case* had been considerably modified by later decisions. This is, however, a misapprehension. Although questions have arisen in some cases whether the facts brought the particular case within the doctrine (see *Bank* v. *Mayor*, 7 Wall., 16, 25), neither the authority of the judgment nor the accuracy of the statement of the law contained in it has ever been questioned in the United States, nor have the doctrines enunciated in it ever been qualified. It is true that in *Osborn* v. *Bank of the United States* (9 Wheat., 738), decided five years later, the Court was asked to reconsider its opinion in the case of *McCulloch* v. *Maryland*. But the reconsideration asked for, and granted, extended only to the question whether the Bank of the United States was an instrumentality or agency of the Republic in such a sense as to render the taxation of its notes by a State an invasion of the sphere of the national government. So far from combating the doctrine that federal instrumentalities are not subject to State control, the counsel for the State conceded that "the States cannot tax the offices, establishments, and operations of the National Government" (9 Wheat., 765, 766), and so fully granted the position as to state it in terms which seem to us to apply strikingly to the present case. He said—"A State is invested with constitutional power to levy a tax upon stamps, and may extend its operations to all dealings of individuals. It cannot subject the transactions of the National Government to the payment of such tax, *because the operations of that Government are national*, and not subject to the power of any of its parts." (*Ib.*, 777).

We are fortified in our conclusion by the fact that the doctrines laid down in *McCulloch's Case* have been adopted and followed in the interpretation of the Constitution of the Dominion of Canada by the Courts of the Provinces of Ontario and New Brunswick since the year 1878, and that their decisions, though uniformly adverse to the Provincial Governments, have not been made the subject of appeal either to the Judicial Committee or to the Supreme Court of Canada; (see *Leprohon* v. *Ottawa*, 3 Ont. A.R., 522, and the other cases cited by the Attorney-General for the Commonwealth). In no American or Canadian case that we can find has it been denied or even doubted "that the Constitution and the laws made in pursuance thereof are supreme; that they control the constitutions and laws of the respective States, and are not controlled by them." Nor has it been in any way questioned, "1st, that a power to create implies a power to preserve; 2nd, that a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and to preserve; 3rd, that, where this repugnancy exists, that authority which is supreme must control, not yield to, that over which it is supreme." (*Marshall*, C.J., 4 Wheat., at p. 426.) These declarations, which are so obvious as to be almost truisms, have found clear expression in the *Constitution Act* itself, which, in its fifth section, commands that "This Act and all the laws made by the Parliament under the Constitution, shall be binding on the Courts, Judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State."

It has been suggested, although the point was not pressed by the Attorney-General for Tasmania, that the doctrines enunciated in *McCulloch's Case* are not applicable to the Commonwealth by reason of the power of veto reserved to the Crown by the Constitution. It is, however, the duty of the Court, and not of the Executive Government, to determine the validity of an attempted exercise of legislative power. The assent of the Crown cannot, nor can the non-exercise of the power of veto, give effect to an invalid law. And it would be to impose an entirely novel duty upon the Crown's advisers if they were to be required, before advising whether the power of veto should be exercised, to

H. C. OF A. 1904.

D'EMDEN v. PEDDER.

consider the validity under the Constitution of the provisions of each Act presented for the Royal Assent. That, as already said, is the function of the judiciary. And, even if such a duty were cast upon the Executive Government, it could neither relieve the judiciary of their duty of interpretation nor affect the principles to be applied in that interpretation.

It is convenient at this point to advert to another misapprehension into which the learned Judges who formed the majority of the Court seem to have been led. They appear to have thought that, accepting the doctrines of *McCulloch* v. *Maryland* as sound law, it is a question in each case whether the attempted exercise of State authority actually impedes the operations of the Federal Government—in other words, that the interference must, in its extent, be such as to cause some actual obstruction or hindrance. Were this the true point of view, the validity of a State law would depend on a question of fact, to be determined, presumably, by a jury, who would be charged to inquire whether the attempted control or interference amounted to a substantial obstruction. It is, however, manifest that the extent of an interference is quite a different thing from the existence of interference in fact. A man's enjoyment of a large estate is not appreciably diminished by the occasional passage of a stranger across an unfrequented part of it. But if the stranger passes under a claim of right there is a substantial interference with the owner's right of property. So the power claimed for the State of Tasmania is, in its nature, in conflict with the exclusive power of legislation given to the Commonwealth over its own Departments, and the greater or lesser extent to which it may be exercised does not enter into the inquiry concerning its existence.

Applying then the test already enunciated, does the Tasmanian *Stamp Act*, assuming it to be applicable to the case, interfere with or exercise control upon the action of a federal officer in the discharge of his duty to the Commonwealth? The Federal *Audit Act* requires him for the purposes of a federal department to give a receipt for his pay, which receipt is to be preserved as a record of the department. The *Stamp Act* says in effect—"If you perform that duty without at the same time contributing to the State revenue, you will be liable to a fine, and in default of payment to imprisonment." How can it be said that this is not an attempt

to exercise control? The attaching by a State law of any condition to the discharge of a federal duty is assuredly an act of interference or control. Moreover, any State enactment which on the face of it attempts to deal with a matter within the exclusive legislative power of the Commonwealth, and upon which the Commonwealth has legislated, is necessarily, so far as it purports to apply to that matter, inconsistent with the law of the Commonwealth.

Before passing from this branch of the subject the case of *Bank* v. *Mayor* (7 Wall., 16) (1868), already referred to, may be mentioned, in which it was pointed out, in a passage which commends itself to our judgment, that taxation of any subject matter necessarily implies control; and also the case of *Crandall* v. *Nevada* (6 Wall., 35), in which it is shown by very cogent argument that the question in such cases is not the extent to which a tax interferes with or controls freedom of action, but whether there is any power to tax. If the power exists, no Court can inquire into the propriety of its exercise. In several of the American cases cited to us this doctrine has been elaborated, and it has been shown—as is, indeed, almost self-evident—that a power to tax, whether it is exercised to the extent of one penny or 10s. in the pound, is equally a power to tax; that, if conceded at all, it must exist in fullness; and that if exercised to its utmost limits it might operate to the destruction or practical prohibition of the thing or transaction in respect of which the tax is imposed. These considerations lead to the inevitable conclusion that the Tasmanian Act in question, if construed as applying to receipts given by a federal officer to the federal treasurer in the course of his federal duty, would be an interference with him in the exercise of that duty, and would therefore be invalid.

It is, however, in our opinion, a sound principle of construction that Acts of a sovereign legislature, and indeed of subordinate legislatures, such as a municipal authority, should, if possible, receive such an interpretation as will make them operative and not inoperative. And this leads us to the other aspect in which the case was presented to the Court. Ought the Tasmanian Act to be construed as applying in its terms to the transactions in question?

It is true that the general words used in the Act are wide enough to include a receipt given by a federal officer to a federal department for his salary. But it is a settled rule in the inter-

H. C. OF A. 1904.

D'EMDEN v. PEDDER.

pretation of Statutes that general words will be taken to have been used in the wider or in the more restricted sense according to the general scope and object of the enactment (*Hardcastle*, 193-4). For instance, it will be taken that general words are not to be applied extra-territorially. It will also be presumed that Parliament did not intend to interfere with international usage, and therefore, unless express words are used, an English Statute will not be held applicable to a foreigner residing out of England. As *Cotton*, L.J., says, interpreting the word "debtor" in the English *Bankruptcy Act* of 1869, "we must not give to general words an interpretation which would violate the principles of law admitted and recognised in all countries" (*Ex parte Blain*, 12 Ch. D., p. 533). Most federal officers in discharging their duties must of necessity live within some one of the several States, and in most cases they are citizens of those States, having all the privileges of citizenship. Most State laws will probably bind them in the same way as other citizens; but to apply the general words of a State law to a federal officer, where the application of the law would be an infringement of the Constitution, seems to us a violation of the principle of construction so clearly stated by Lord Justice *Cotton*. In our judgment the operations of the Commonwealth, and the acts of its agents as such, ought, so far as regards State control, to be considered on the same footing as if they did not occur within the territorial limits of any State. The State law in question was passed after the Federal Postal Act had become law, and we should not, we think, be justified in assuming that the Tasmanian Parliament intended the general words of their enactment to have an application which would conflict with the Constitution of the Commonwealth. In our view, therefore, the Tasmanian Statute under consideration should be construed as not applying to a receipt given by a federal officer under the circumstances of this case. For these reasons we think that the decision appealed from was erroneous, and that the appeal should be allowed. The respondent must pay the costs of the appellant in the Supreme Court and the costs of the appeal.

Appeal allowed with costs; conviction quashed with costs.

Solicitor, for appellant, *Allport.*

Solicitor, for respondent, *State Crown Solicitor.*