[HIGH COURT OF AUSTRALIA.]

ROBERTS . . . . . APPELLANT;
DEFENDANT,

AND

AHERN . . . . . RESPONDENT;
INFORMANT.

ON APPEAL FROM COURT OF PETTY SESSIONS, VICTORIA.

H. C. OF A. 1904.

MELBOURNE, *June* 3, 7, 8, 9, 10. *August* 10.

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

Police Offences Act 1890 (*Victoria*) (*No.* 1126), *sec.* 5—*Application of Act to Crown—Protection of servants and agents of Crown—Appeals to High Court from inferior Courts of States.*

The Executive Government of the Commonwealth or of a State is not bound by a Statute unless the intention that it shall be bound is apparent.

Held, therefore, that sec. 5 of the *Police Offences Act* 1890 (Victoria) did not, when it came into force, affect the Government of Victoria, and does not now affect the Government of the Commonwealth or its agencies in the management of departments transferred to the Commonwealth.

Where an act may lawfully be done by the Crown either at common law or by statute, the Crown is not restricted in its choice of agents or in the form of their appointment or in the mode of their remuneration, and the agents may do the act by their own hands or by those of their servants.

Held, therefore, that a person who, being the servant of an independent contractor employed by the Government of the Commonwealth to remove night-soil from Commonwealth premises, carried out that work without a licence from, and without having given any security to, the local authority, was not guilty of an offence under sec. 5 (vii.) of the *Police Offences Act* 1890.

Observations as to appeals direct from inferior State Courts to the High Court.

APPEAL from the Court of Petty Sessions at Inglewood, Victoria.

The appellant, Roberts, was charged on information by the respondent, Ahern, inspector of nuisances for the Borough of Inglewood, for that "on the 25th March, 1904, he carted away

nightsoil without a licence from, and without having given any such security as is required by, the local authority, contrary to the Act in such case made and provided." The prosecution was instituted under sec. 5 (vii.) of the *Police Offences Act* 1890 (Victoria). The appellant having been convicted and fined, an order was made *ex parte* giving him special leave to appeal to the High Court.

From the affidavits used on the hearing of the appeal it appeared that the appellant had on the day in question carted away nightsoil from the Post Office at Inglewood, and that he had not obtained a licence to do so from the Borough of Inglewood, and had not given any security to that Borough. It also appeared that on the hearing of the information, the appellant had said "I was employed by one Appleby, who has a contract with the Commonwealth, and I was acting as his servant on behalf of the Commonwealth through the Postmaster;" that he asked for an adjournment in order that he might get professional assistance, and that an adjournment was refused.

Mitchell, K.C., and *Robinson*, for the defendant appellant. Sec. 5 (vii.) of the *Police Offences Act* 1890, under which this prosecution was brought, would not bind the Crown as represented by the State. The Crown is not specifically named; *Cooper* v. *Hawkins*, (1904) 2 K.B., 164; *Gorton Local Board* v. *Prison Commissioners*, *ibid.*, note p. 165. It would be contrary to principle that the Crown should be bound by an Act which confers on a municipal authority an unrestricted power to make by-laws regulating the issuing of licences and fixing the amount of security to be given in respect of the doing of an act. The *Local Government Act* 1890 gives power to a municipality to make by-laws and to adopt certain by-laws in the Schedules, and the *Health Act* 1890 also gives power to make by-laws. Nowhere, however, is there any specific authority to make such a by-law as is contemplated by sec. 5 (vii.) of the *Police Offences Act* 1890.

[GRIFFITH, C.J.—The words of that section seem to give power to make by-laws necessary to carry the section into effect.]

As to the Crown being bound see *Hornsey Urban District Council* v. *Hennel*, (1902) 2 K.B., 73; *R.* v. *Cook*, (1790) 3 T.R.,

H. C. OF A. 1904.

ROBERTS v. AHERN.

519; *Coomber* v. *Justices of Berks*, (1883) 9 App. Cas., 61, at p. 72; *Grieve* v. *Johnston*, (1894) 15 A.L.T., 252; *Richmond Municipality* v. *Grey*, 29 V.L.R., 335. There is no case in which the Crown has been held to be bound where a discretion is left to a local body to prescribe terms upon which an act is to be done.

[GRIFFITH, C.J.—A municipal authority cannot control the State without specific authority being given. That applies just as well between the State and a local authority as between the Commonwealth and a State.]

Even if this Act, by necessary implication, binds the Crown as represented by the State, it does not bind the Crown as represented by the Commonwealth; *Municipal Council of Sydney* v. *The Commonwealth*, *ante* p. 208.

[GRIFFITH, C.J.—But if the Crown is bound by implication that must apply also to the Crown as represented by the Commonwealth. The implication must be the same in both cases. In *Municipal Council of Sydney* v. *The Commonwealth* the Crown was specifically named, and we held that must refer to the Crown as represented by the State.]

The Commonwealth is not to be left at the mercy of a local authority of a State. The State police laws do not apply to any act done under the authority of the Commonwealth government, which is necessary for or incidental to the proper carrying on of any one of the government departments the control of which is vested in the Commonwealth government. A by-law which would control the administration of a Commonwealth department would be no more binding than a State taxing Act which would have the same effect. The power which is necessary to the due and efficient carrying out of a Commonwealth department is necessarily given to the Commonwealth. If that be not so, then in this particular case the Commonwealth must apply to the municipality for permission to do this particular act, and must pay whatever sum is demanded.

[O'CONNOR, J.—On the other hand the Postal Department for instance might refuse to make use of the Melbourne sewerage system.]

If the Commonwealth were to legislate as to the way in which sanitation should be carried out in respect of its departments,

then under the express language of the Constitution, sec. 52 (2), that legislation would prevail over that of the States.

[*Isaacs*, K.C.—That legislation would not apply to acts done in the public streets.]

The Commonwealth would be a prisoner in its own premises, it would be under the control of the States, just as in the case of a State taxing Act. As regards emergencies there must be power in the Commonwealth Executive to do acts necessary to carry on the departments without legislation for the purpose being passed by the Commonwealth Parliament.

[O'CONNOR, J.—It would appear that if it is necessary for public health, or public safety, that the State should give power to a municipal authority to make by-laws, they would bind the Commonwealth.

GRIFFITH, C.J.—Under sec. 39 of the *Police Offences Act* 1890, the postmaster would be liable as the employer of the defendant.]

The principle laid down in *D'Emden* v. *Pedder*, *ante* p. 91, is not confined in the United States to taxing Acts, but extends to police Acts; *In re Thomas*, (1897) 82 Fed. Rep., 304; (1899) 173 U.S.R., 276; *In re Waite*, (1896) 81 Fed. Rep., 359; (1898) 88 Fed. Rep., 102; *In re Neagle*, (1889) 135 U.S.R., 1, at p. 61; *Kidd* v. *Pearson*, 128 U.S.R., 1; *Royall* v. *Virginia*, (1885) 116 U.S.R., 573; *In re Debs*, (1894) 158 U.S.R., 581; *Crandall* v. *Nevada*, (1867) 6 Wall., 35. If the States have power to legislate in this way, it would give them an easy mode of getting over the prohibition against taxation of Commonwealth property. If the particular thing done cannot be done without committing a nuisance, the Commonwealth may nevertheless do it. If it is contended that this particular act was not a necessary act, then the defendant was entitled to an adjournment. He should have been allowed to prove the existing circumstances. To refuse him the opportunity of doing so was a denial of justice.

[GRIFFITH, C.J.—Is there any distinction between common law offences and statutory offences?]

No. If the work necessary under existing circumstances to be carried out by the Commonwealth could not be carried out without infringing the State criminal law, the person carrying it out would not be liable.

H. C. OF A. 1904.

ROBERTS v. AHERN.

[GRIFFITH, C.J.—Can the action of the Commonwealth authority in deciding whether or not there is an emergency be enquired into?]

No. When that authority has decided that the Act must be done whether forbidden by the State law or not, the person doing it is protected.

[O'CONNOR, J.—In the American cases the proof of necessity is put upon the State legislation, and the question is whether it is necessary for the public safety or health that the State law should be enacted. See *Pound* v. *Turck*, (1877) 95 U.S.R., 459.]

It is necessary for the carrying on of the Post Office that this act should be done, and there is a discretion as to the way in which it should be done. Assuming the *Police Offences Act* 1890 applies to the Crown, when this property was transferred to the Commonwealth it was taken out of that Act; see the Constitution, sec. 5. It is not clear whether this Act comes within sec. 108 of the Constitution. That question depends on whether that section includes an Act as to a matter in respect of which the Commonwealth has exclusive jurisdiction given to it. The difficulty arises in reading secs. 107 and 108 together.

Isaacs, K.C. (with him *Levinson*), for the respondent. A contractor with the Crown is not a servant of the Crown. The remedy for breach of a contract is damages; a breach of service under the Crown is a misdemeanour. The protection of the Crown does not extend to an independent contractor, but only to a person in the direct and immediate service of the Crown. There must be a contract for personal service to the Crown.

[GRIFFITH, C.J.—Do you say the person must be in the permanent service of the Crown?]

Not necessarily so.

[BARTON, J.—Cannot the servant employ another person to do the work for him?]

The exemption of the Crown would not extend to that person. It is a personal exemption of the Crown. The person claiming protection must be able to say "I am in law the Crown."

[O'CONNOR, J.—Would the postmaster be liable under sec. 39 of the *Police Offences Act* 1890 as the employer of the defendant?]

If the contract were a personal one with the postmaster, the Crown would not be concerned with it. If the contract were not a personal one with the postmaster, the Crown would be the employer and not the postmaster. The licence under sec. 5 (vii.) of the *Police Offences Act* 1890, is to the man actually doing the work, and does not protect another person doing the work under his authority. In all the cases cited, the person doing the act complained of was a servant of the Crown. Where a federal Act says that such a thing is lawful, and that Act is within the federal domain, every person concerned in doing that thing is protected. If there had been a federal Act here saying that what was done was lawful, the only question would be whether that Act was constitutional.

[GRIFFITH, C.J.—Assuming that the *Police Offences Act* would not apply to a privy on Commonwealth premises, would it not apply to the carrying away of nightsoil from that privy ?]

Yes, as soon as the nightsoil was off the Commonwealth premises and on the public street. In *Jones* v. *Mersey Docks and Harbor Board Trustees*, (1864) 11 H.L.C., 443, at p. 501, Lord *Westbury* says that the exemption of the Crown in respect of the rating of premises only extends to persons in the direct and immediate service of the Crown, occupying premises for the purposes of the Crown. See also *Hardcastle on Statutes*, 3rd ed., pp. 385, 387; *Perry* v. *Eames*, (1891) 1 Ch., 658; *R.* v. *Justices of Kent*, (1890) 24 Q.B.D., 181; *R.* v. *Cook*, (1790) 3 T.R., 519.

[GRIFFITH, C.J.—Is not the defendant an instrumentality of the Crown ?]

No. If he were then every person who contracted to do work for the Crown would be an instrumentality of the Crown. The facts must be looked at to see whether the person seeking protection is a servant of the Crown. In *Dixon* v. *London Small Arms Co.*, (1866) 1 App. Cas., 632, it was held that an independent contractor with the Crown had not the right to make a patented article although the Crown itself had that right as was decided in *Feather* v. *The Queen*, (1865) 6 B. & S., 257.

[GRIFFITH, C.J.— When a corporation is authorized by Statute to do an act unlawful at common law, and which the corporation cannot be expected to do itself, that act is lawful if done by any

H. C. OF A. 1904.

ROBERTS v. AHERN.

person on behalf of the corporation. The corporation may employ an independent contractor to do the act. In the case of an act lawful at common law, but prohibited by Statute except in the case of the Crown, has not the Crown a similar right to direct anyone to do it, so as to protect that person ?]

No. Every prohibited act is unlawful *primâ facie*. Every subject has to obey the prohibition, unless he can bring himself within the exemption by saying that in law he is the Crown.

[GRIFFITH, C.J., referred to *Newton* v. *Ellis*, (1855) 5 El. & Bl., 115. I cannot see any difference in principle, whether the act is lawful at common law or is authorized by Statute.]

As to the kind of relation which must exist between the Crown and the person seeking the protection of the Crown, see also *Coomber* v. *Berks Justices*, (1883) 9 App. Cas., 71 ; *Hardcastle on Statutes*, p. 391 ; *Greig* v. *University of Edinburgh*, (1868) L.R., 1 H.L. (Sc.), 348 ; *Worcestershire County Council* v. *Worcester Union*, (1897) 1 Q.B., 480 ; *Hornsey Urban Council* v. *Hennell*, (1902) 2 K.B., 73.

[O'CONNOR, J.—In all those rating cases the question is the nature of the occupation. The premises must be in the occupation of the Crown either by the Crown or by its servants. That does not seem to me to affect the question here.]

The principle is the same whether the matter under consideration is rating, or taxation, or liability for breach of a statutory prohibition. In all the cases just referred to the persons occupying were really servants of the Crown. So also in *Gorton Local Board* v. *Prison Commrs.*, (1904) 2 K.B., 165 (*n*) ; *Grieve* v. *Johnston*, (1894) 15 A.L.T., 252 ; and *Mayor of Richmond* v. *Gray*, (1903) 25 A.L.T., 88 ; 29 V.L.R., 335. The distinction between a contractor and a servant is seen in *Monagle* v. *South Melbourne*, (1899) 20 A.L.T., 146, where the test was under whose control the man was. See also *Waldock* v. *Winfield*, (1901) 2 K.B., 596.

[GRIFFITH, C.J.—That question is only important as to the liability of the principal, but not as to the immunity of the man. See *Newton* v. *Ellis*, 5 El. & Bl., 115.]

In that case the only question was whether the Act was authorized. In relation to immunity the maxim is not that a Statute does not apply to a subject doing an act authorized by

the Crown, but that the Statute does not apply to the Crown. The particular act in this case would have have been lawful without the authority of the Crown, if done by a man having a licence. If the Crown can authorize an act otherwise unlawful to be done by a contract, then a contract to make up goods, the Crown supplying all the material and the contractor supplying only the labour, would give the immunity of the Crown to the contractor. A general principle cannot be laid down that authority given by the Crown in any manner whatever for the doing of an act protects the person who does the act. This act having been done in the street, and away from Crown premises, is unlawful, whether the person doing it was a servant of the Crown or not. The provision in the *Police Offences Act* is an ordinary police provision, and applies to the defendant just as to any other person in the State. In *R.* v. *Bamford*, (1901) 1 N.S.W.L.R. (L.), 357, it was held that provisions as to crimes in a State Act passed before the institution of the Commonwealth, continued to apply even upon Commonwealth premises. The power to establish ordinary regulations of police is left to the State ; *Patterson* v. *Kentucky*, (1877) 501, at p. 503 ; *National Bank* v. *Commonwealth*, (1869) 9 Wall., 353, at p. 362. The Commonwealth Parliament cannot make police laws to apply outside Commonwealth territory. As to whether this is a criminal law or not must be determined by the object and the sanction.

[GRIFFITH, C.J.—The object is that an act which may be dangerous shall only be performed by those who are to be trusted.]

If it is not within the power of the Commonwealth Parliament to authorize this act, then the Executive cannot authorize it. If it is a matter as to which the Commonwealth Parliament can legislate, in the absence of legislation sec. 108 of the Constitution continues this State legislation until the Parliament of the Commonwealth itself legislates on the matter. As to the question of the relation of the Commonwealth to the State, *In re Thomas*, 82 Fed. Rep., 304, was a case of interference with the internal administration of a federal institution, just as *D'Emden* v. *Pedder* (*ante* p. 91) was. In *In re Waite*, 81 Fed. Rep., 359, the act was done by a person in his official capacity. *In re Debs*, 158 U.S.R., 581, is not a case of immunity from State laws at all. It

H. C. OF A. 1904.

ROBERTS v. AHERN.

was held that the Commonwealth had sole control of the mails, and that no one could obstruct them. A State Act which is strictly and legitimately for police purposes and which does not interfere with the Commonwealth domain, is good, see *Plumley* v. *Massachusetts*, (1894) 155 U.S.R., 461, at p. 479. The Court will not define what are police laws, but they include at least laws for the protection of life, morals and health. See also *Russell on Police Powers in the State*, chap. VI. As to *Newton* v. *Ellis* (*supra*), the Court held that the contract in effect was that the work should be done by the defendant under the direction and control of an officer of a local Board, and therefore that he was the servant of the Board.

They also referred to *Re Napier's Patent*, 6 App. Cas., 174; *Fitches* v. *Burnell*, (1877) 3 V.L.R. (L.), 194; *Wells* v. *Nickles*, (1881) 104 U.S.R., 444; *Royall* v. *Virginia*, (1885) 116 U.S.R., 573; *Fort Leavenworth Railroad Co.* v. *Lowe*, (1884) 114 U.S.R., 525, at p. 531; *Cumfield* v. *United States*, (1896) 167 U.S.R., 578; *Cote* v. *Watson*, 2 Cartwright, 4; *Bank of Toronto* v. *Lambe*, (1877) 12 App. Cas., 575; *Lefroy's Legislative Power in Canada*, p. 677; *Ex parte Postmaster-General*, 10 Ch. D., at p. 601.

Mitchell, K.C., in reply. The fact that the defendant is the servant of an independent contractor does not prevent him from coming within the exemption of the Crown, assuming, that is, that the *Police Offences Act* does not apply to the Crown. The test is not whether the defendant is within that limited class of servants or agents from which is excluded an independent contractor, but whether the work is being done on behalf of the Crown, whether the work is work which the Government should do in carrying on the government, and therefore can direct someone else to do for it. In *Coomber* v. *Justices of Berks*, 9 App. Cas., at p. 65, the question was: Was the occupation by a servant of the Crown or for the purposes of the Crown? See also *Greig* v. *Edinburgh*, L.R., 1 H.L. (Sc.), 348. If the Crown can direct its servant to do an act, it can direct anyone to do the act. It does not matter whether he is ordered to do it or whether he is paid a specified sum to do it.

[*Isaacs*, K.C.—It is not contended that the relation between the

Crown and the agent must be created by appointment. It may be created by contract. He referred to *Kennedy* v. *De Trafford*, (1897) A.C., 180, at p. 188 ; *R.* v. *Negus*, L.R., 2 C.C.R., 34.]

The *Police Offences Act* does not apply to the Crown. These provisions are only applicable to certain localities, and, inasmuch as they do not apply to the whole State they are not State police provisions. Sec. 5 is not a criminal section ; it does not prohibit the doing of an act, but only prescribes the mode in which it is to be done. The discretion of the Crown as to how it will do the act is not to be presumed to be taken away. Otherwise the officer in command of soldiers who directed them to do this act, would be liable, under sec. 39, as aiding and abetting. The fact that some part of the act is done outside Commonwealth premises makes no difference. The Crown's prerogative in respect of Victoria runs outside the Commonwealth premises. The street is Crown property. Exemption is not claimed because the property is owned by the Commonwealth, but because the work is necessary and incidental to the due carrying on of a department of the Government, and cannot be confined to Government premises. For these reasons, had the defendant been doing the work for the State Government, he would not have been liable, because he was a servant or agent of the Crown, or was doing the act under the directions of the Crown. If the State would not be bound, the Commonwealth is not bound. The matter comes down to the question : Was this act such an act as the Executive had power to authorize to be done ? The American decisions are to the effect that in respect of anything authorized by a valid federal authority the State criminal laws do not apply. The State laws as to murder, for instance, do not apply to a person acting in pursuance of federal functions. If by the Constitution there is no power given to do what is necessary or incidental to the due carrying on of a department, any State law which will hinder or control the doing of that act is inapplicable. The Commonwealth Parliament has power to legislate as to this matter, and until it does the Executive has power to authorize the doing of the act.

[O'CONNOR, J.—Do you contend that the Commonwealth is not bound by State regulations as to the use of roads ?]

It is not if the infringment of the regulations is necessary for

H. C. OF A. 1904.

ROBERTS v. AHERN.

Commonwealth purposes. For instance, it might be necessary for persons on Commonwealth business to travel at an extraordinary speed. It is not contended that this State law is bad, but only that it does not apply to the Commonwealth. If it is necessary for the defendant to go into the question of whether or not this act was necessary, he was prevented from doing so by the refusal of an adjournment.

They also referred to the Constitution, secs. 51 (9), 105, 106; *In re Thomas*, 87 Fed. Rep., 453; *Kisby* v. *Jenkins*, 23 V.L.R., 64; 19 A.L.T., 186.

Levinson, by permission, referred to *R.* v. *Parsons*, 16 Cox C.C., 498.

Cur. adv. vult.

10th August.

The judgment of the Court was read by

GRIFFITH, C.J. This is an appeal from a conviction made by the Court of Petty Sessions at Inglewood upon a complaint preferred by the respondent, who is inspector of nuisances of that Borough, charging the defendant "that on 25th March, 1904, he carted away nightsoil without a licence from, and without having given any such security as is required by, the local authority, contrary to the Act in such case made and provided." The Statute in question is the Victorian *Police Offences Act* 1890 (No. 1126). Sec. 5 of that Act enacts that "Any person guilty of any of the following offences omissions or neglects shall on conviction pay a penalty not exceeding £20. . . . (vii.) Emptying any privy or cesspit or carting away any nightsoil or other offensive matter without a licence from and without having given such security as is required by the local authority." The term "local authority" in the case of a borough means the council of the borough. At the hearing of the complaint it was proved that the appellant had done the act alleged for the purpose of discharging sanitary duties in connection with the post office at Inglewood. It is stated in the depositions that on being called on for his defence, he said that he was authorized by the Commonwealth Government, through the postmaster, to remove nightsoil from the post office, and asked for an adjournment to enable him to

obtain professional assistance. The adjournment was refused, and the appellant was convicted and fined. It appears that by the Victorian law the statement of the defendant (the truth of which is not denied) may be regarded as evidence given on his behalf. The defence set up was evidently treated as one raising an untenable point of law, and an appeal would clearly lie from a decision over-ruling it. Special leave to appeal was granted by this Court. The decision was, however, a decision given in the exercise of jurisdiction conferred by sec. 39 of the *Judiciary Act*, from which an appeal lies to the High Court as of right. The leave, therefore, which was asked for *ex abundanti cautelâ*, must not be regarded as a precedent for holding that the Court can, or, if it can, will, grant special leave to appeal from a decision of an inferior Court of a State given otherwise than in the exercise of federal jurisdiction.

The appeal was brought on the ground that the enactment in question does not extend to control the operations of the Executive Government of the Commonwealth. In support of this contention various points were raised and discussed before us, but in the view that we take of the matter it is not necessary to consider more than one of them, namely, whether sec. 5 of the Victorian *Police Offences Act*, when it was passed, bound the Executive Government of Victoria. It is not disputed that, if it did not bind the Victorian Government, it does not now bind the Federal Government, to which the rights and obligations of that Government in respect of the Post and Telegraph Department have been transferred.

It is a general rule that the Crown is not bound by a Statute unless it appears on the face of the Statute that it was intended that the Crown should be bound by it. This rule has commonly been based on the Royal prerogative. Perhaps, however, having regard to modern developments of constitutional law, a more satisfactory basis is to be found in the words of *Alderson*, B., delivering the judgment of the Court of Exchequer in *A.-G.* v. *Donaldson*, 10 M. & W., 117, at p. 124: "It is a well established rule, generally speaking, in the construction of Acts of Parliament that the King is not included unless there be words to that effect; for it is inferred *primâ facie* that the law made by the Crown

H. C. OF A. 1904.

ROBERTS v. AHERN.

with the assent of Lords and Commons is made for subjects and not for the Crown." The modern sense of the rule, at any rate, is that the Executive Government of the State is not bound by Statute unless that intention is apparent. The doctrine is well settled in this sense in the United States of America. In the language of *Story*, J.: "Where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischief to be redressed, or the language used, that the Government itself was in contemplation of the legislature, before a court of law would be authorized to put such a construction upon any Statute. In general, Acts of the legislature are meant to regulate and direct the acts and rights of citizens, and in most cases the meaning applicable to them applies with very different and often contrary force to the Government itself. It appears to me, therefore, to be a safe rule founded on the principles of the common law that the general words of a Statute ought not to include the government unless that construction be clear and indisputable upon the text of the Act." *United States* v. *Hoar*, 2 Mason (U.S. Circuit Court), 311.

With regard to the Statute now under consideration, so far from its text suggesting a clear intention to control the action of the Executive Government a contrary intention is, *primâ facie*, more probable. At the time when the Act was passed the Executive Government had the control of many great institutions, gaols, orphanages, asylums, police barracks, government departments of all sorts, and occasionally military encampments, and it is *primâ facie* unlikely that the legislature should have intended to subject the Executive Government to the uncontrolled discretion of a local authority with regard to the sanitary arrangements of such institutions. Such a construction would have rendered the executive officers of the State themselves liable to prosecution whenever they procured any such act to be done without the license of the local authority or without giving security to its satisfaction. Moreover, the provision in question is contained in Part I. of the Statute, which is headed "Police Provisions applicable to Special Localities," and is only to be brought into force by proclamation (sec. 4), although the whole of Part I. was by another Statute of the same year made applicable to Boroughs. The cases of *Cooper*

v. *Hawkins*, (1904) 2 K.B., 164; *Gorton Local Board* v. *Prison Commissioners*, *ibid.*, 165*n*; and *Gomm* v. *Bennett*, 21 V.L.R., 608*n*; 16 A.L.T., 223, lead to the same conclusion. In our judgment, therefore, the provision in question did not affect the Victorian Government and does not now affect the Federal Government or its agencies in the management of the Post and Telegraph Department. This point, indeed, was not very seriously contested by Mr. Isaacs, who rested his argument in support of the conviction mainly upon the contention that the immunity of the Executive Government only extends to persons who stand to it in the direct and immediate relation of servants, and does not afford any protection to persons who stand in the relation of contractors for service, or at any rate, not to the servants of such contractors. The exact facts as to the appellant's employment were not ascertained before the Court below, but it appears from an affidavit filed on behalf of the appellant that what he actually said in defence was: "I was employed by one Appleby, who has a contract with the Commonwealth, and I was acting as his servant on behalf of the Commonwealth, through the postmaster." Taking the fact to be as so stated, Mr. Isaacs relied upon the case of *Dixon* v. *London Small Arms Co.*, 1 App. Cas., 632, as establishing the rule for which he contended. But on examination we do not think that it establishes or involves any such rule. The appellant in that case was the holder of certain patents for improvements in the manufacture of small arms. The respondents were contractors for the manufacture and supply of small arms for the use of His Majesty, and in the course of the manufacture they made use of the appellant's patents. It was not disputed that the Crown was itself entitled to use the patents, but the question was whether, under the circumstances, the defendants could take advantage of the Crown rights. As pointed out by Lord *Penzance* (p. 651), the real question in the case was whether, under the circumstances, the contract which was made between the respondents and the Government was a contract of agency, or a contract of sale. All the learned Lords considered the matter from that point of view, and came to the conclusion that the contract was one of sale, and not of agency, and that the respondents were not therefore entitled to the benefits

H. C. OF A. 1904.

ROBERTS v. AHERN.

which they would have had if the contract had been one of service or agency. Lord *Selborne* said (p. 660): "The case, therefore, in my opinion, depends upon the question whether the relation of master and servant, or of principal and agent, existed between the Crown and these respondents during the process of the manufacture of the breech action in question, and for the purposes of that manufacture; and this question must, in my opinion, be decided by a strict and accurate application of legal principles to this particular contract, exactly in the same manner as if any private person, and not a public department, had contracted with the respondents in the terms of the documents before us for the supply of these arms.

"I cannot doubt as to the answer to be given to the question when that test is applied. There is clearly no contract of hiring and service, and I am equally clear that any private persons who entered into such a contract would not have been liable for the acts of the defendants during the process of manufacture, as a principal is liable for the acts of his agent. It is not like the case of a railway contractor who executes work which the company itself is bound by law to execute, and which can only be executed by the directors, or by some person acting by their authority, and entitled on their behalf to exercise the powers vested in them by the legislature."

Applying the same principle to the present case, it appears to us that the relation of principal and agent existed between the Commonwealth Government and Appleby and his servants, in the discharge of the duties in question, and that the mode of their remuneration and the terms of their employment are immaterial. When an act unlawful at common law is made lawful by Statute, it is clear that the authorization extends to the protection of all persons and agencies employed in doing the act, and it is immaterial whether the persons are so employed under a contract or stand in the direct relationship of servants to the persons who have the statutory authority. Of this rule, *Newton* v. *Ellis*, 5 E. & B., 115; 24 L.J.Q.B., 337, affords a good illustration. Nor can it make any difference whether the act in question is one which, being unlawful at common law, is made lawful by Statute, or is one which, being lawful at common law, is not made unlawful

by any Statute. The case of *Black* v. *Christchurch Finance Co.*, (1894) A.C., 48, is authority, if authority be needed, for the proposition that the liability of the principal for the acts of his agent is not excluded by the fact that the agent is a contractor, or himself works by sub-agents. The terms of the employment must be the subject of inquiry to the extent of ascertaining that the relation of service or agency exists in fact, but in our judgment the Executive Government cannot be controlled either in its choice of agents or in the form of their appointment or mode of their remuneration. Nor, in our judgment, is it material whether the appointed agent does the work with his own hands, or through the medium of his servant. For these reasons we think that the appeal must be allowed.

Appeal allowed with costs.

Solicitor, for appellant, *Powers*, Commonwealth Crown Solicitor.

Solicitor, for respondent, *Pyman*, Melbourne.

[HIGH COURT OF AUSTRALIA.]

HIS MAJESTY'S ATTORNEY-GENERAL IN AND FOR THE STATE OF NEW SOUTH WALES . . . . . } APPELLANT;

AND

BRIDGET METCALFE, RICHARD THOMAS WATKINS, WILLIAM WATKINS, MATILDA MOLONEY, MICHAEL HOGAN, AND DENIS O'KENNEDY . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Will—Construction—Charitable purposes—Indefiniteness.

A devise of real property to "the Reverend D. O'K. . . . Parish Priest," with a direction to sell and expend the moneys derived from the sale thereof "in and towards Church or Convent purposes at C. or for any other purpose or purposes that in his discretion he may think best":