[HIGH COURT OF AUSTRALIA.]

THE MUNICIPAL COUNCIL OF SYDNEY . PLAINTIFFS;

AND

THE COMMONWEALTH . . . . . DEFENDANTS.

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April 6, 7, 8, 26.

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

Taxation of Commonwealth property by State—Powers of States—Express and implied restriction—Municipal rates—Lands "Vested" in the Commonwealth —"Matters within the powers of the Commonwealth—Sydney Corporation Act, 42 *Vict.*, *No.* 3, *sec.* 103 (*Consolidating Act*, *No.* 35 *of* 1902, *sec.* 110)—*Commonwealth of Australia Constitution Act* (63 & 64 *Vict.*, *c.* 12), *cov. clause* 5—*Constitution of the Commonwealth*, *ss.* 51, 52, 85, 108, 114.

To levy a municipal rate upon Commonwealth property is to "impose a tax" within the meaning of sec. 114 of the Constitution.

Upon the establishment of the Commonwealth, and, subsequently, certain lands and buildings within the boundaries of the City of Sydney, the property of the Government of New South Wales, became vested in the Commonwealth by virtue of secs. 85 (i.) and 86 of the Constitution. Before the establishment of the Commonwealth these lands and buildings, as Crown lands in New South Wales, were liable to be rated, and were rated by the plaintiff Council under sec. 103 of the *Sydney Corporation Act* of 1879, sec. 110 of the *Sydney Corporation* (*Consolidating*) *Act* of 1902. After the vesting of the lands and buildings in the Commonwealth, the plaintiff Council claimed to be entitled to be paid rates thereon by the Commonwealth.

Held, that the liability of the lands and buildings to be rated was not continued by sec. 108 of the Constitution, and that, therefore, by virtue of sec. 114, the Commonwealth was not liable to pay rates in respect of them.

Held, also, that sec. 110 of the *Sydney Corporation Act* should be construed as not intended to apply to land the property of the Commonwealth.

Individual opinions of members of the Convention expressed in debate cannot be referred to for the purpose of construing the Constitution.

SPECIAL CASE.

This was a special case for the opinion of the Court stated in pursuance of O. XXIX. of the Rules of the High Court. The facts as set out in the case were as follows:—

On and since the establishment of the Commonwealth, under the provisions of the *Commonwealth of Australia Constitution Act*, certain buildings situate in the City of Sydney, in the State of New South Wales, that is to say the Customs House, the General Post Office and certain other Post Offices, and certain buildings used exclusively in connection with the Department of Naval and Military Defence, became vested in the Commonwealth. The Customs House became so vested on the establishment of the Commonwealth, and the Post Offices and the Defence buildings upon the transfer to the Commonwealth of certain Departments of the Public Service of the State of New South Wales, and continued to be so vested to the 2nd March, the date of the special case.

The Commonwealth was established on the 1st January, 1901, and the Departments of Posts and Telegraphs and Telephones and Naval and Military Defence were transferred on the 1st March, 1901.

Since their so vesting the said buildings were always occupied by the defendant for the purposes of the Public Service of the Commonwealth.

The plaintiff Council contended that the said buildings were, and continued since their said vesting in the Commonwealth, rateable property within the meaning of sec. 103 of the *Sydney Corporation Act* 1879, and of sec. 110 of the *Sydney Corporation Act* of 1902, Acts passed by the State legislature of New South Wales, and that by virtue of and in compliance with the provisions of the said Statutes, the plaintiff Council was and continued to be entitled to be paid rates thereon by the Commonwealth. The defendant, the Commonwealth, on the other hand disputed all liability to pay the said rates or any part thereof.

The question of law for the opinion of the Court was whether the Commonwealth was liable for the said rates.

It was admitted that, if the Commonwealth was liable for the said rates, all conditions precedent necessary under the said Sydney Corporation Acts for the recovery of the said rates had been complied with by the plaintiff Council.

The parties to the case signed a memorandum to the effect that, should judgment of the Court be given in the affirmative, on such

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judgment being given the sum of seven thousand nine hundred and eighty-seven pounds five shillings and nine pence should be paid by the defendant to the plaintiff with costs of the cause, and that should judgment of the Court be given in the negative, on such judgment being given the costs of the cause should be paid by the plaintiff to the defendant.

Wise, K.C., Attorney-General for New South Wales (*Want*, K.C., and *Edmunds* with him), for plaintiffs. The question is whether Crown lands in New South Wales that were liable to pay rates became divested of that obligation upon passing from the control of the State to that of the Commonwealth; whether property that is permitted by the New South Wales Government to be rated ceases to be subject to rates by the fact of its vesting in the Crown as representing the Commonwealth, instead of vesting in the Crown as representing the Government of New South Wales. First: the power of taxation is an essential attribute of a State, and cannot be taken away except by express legislative direction; *Story on the Constitution*, 940, 941; *Federalist*, 32, 36; *Railroad Co.* v. *Peniston*, 18 Wall. (U.S.), 5, at p. 29. There is nothing in the Constitution that puts express restraint upon this power to tax, or upon its right to empower the Council to impose rates. At any rate there is nothing in the Constitution that has expressly destroyed the right to levy rates that was possessed by Municipal Councils at the date of the establishment of the Commonwealth. At that date the plaintiffs by virtue of 2 Edw. VII., c. 35, sec. 110, sub-sec. 4 (sec. 103 in the *Sydney Corporation Act*, 43 Vict., No. 3) had power to levy rates upon Crown property. By sec. 85 (1) of the Constitution the property in question in this case was transferred to the Commonwealth. Sec. 114 then says "a State shall not, without the consent of the Parliament of the Commonwealth impose any tax on property of any kind belonging to the Commonwealth." These latter words do not relieve the Commonwealth from the obligations that attached to the ownership of this property at the date of transfer, (1) because the word "tax" in sec. 114 does not include a "rate"; (2) because the section refers to future and not existing legislation. As to the first, the word

"tax" must be given its ordinary and natural meaning. Rates in aid of the Church and the poor in England were held to be improperly called taxes, that term being strictly applicable only to imposts in aid of the Crown; *per Holt*, C.J., in *Brewster* v. *Kidgill*, 12 Mod. Rep., 166, at p. 167. "Taxes" do not include local county rates; *R.* v. *Inhabitants of Aylesford*, 2 E. and E., 538. There *Cockburn*, C.J., distinguished rates from taxes, holding, as *Holt*, C.J., had done, that the latter included only levies in aid of the Crown. Rates imposed by local bodies are properly not burdens but payment for services rendered, whereas taxes are burdens or contributions towards the expenses of the Crown. This distinction is shown in *Illinois Central* v. *Decatur*, 147 U.S.R., 190, at pp. 194, 202, where it was held that exemption from taxation was not exemption from the payment of rates.

[GRIFFITH, C.J.—That case turned upon the distinction between an assessment for special purposes and rates in general. The assessment was distinguished from general rates as well as from taxes.]

I cite it to show that in America the word "tax" is not taken necessarily to include all kinds of imposts. I adopt the first part of the judgment, which agrees with that of *Holt*, C.J., in *Brewster* v. *Kidgill* (*supra*). All our rates are special assessments within the meaning of the section dealt with in that case; they are payments for services rendered, not imposts for public uses. The Constitution does not anywhere contemplate any other kind of imposts than those imposed by a State or the Commonwealth Government.

Again: sec. 114 applies only to future and not existing legislation, because the future tense "shall impose" is used, and the words "without the consent of Parliament" imply that the section cannot be intended to come into operation until there is a Parliament able to consent. Moreover, in the same section a distinction is drawn between "raising" and "maintaining," thus making it clear that when an existing state of affairs was referred to an apt word would be used. "Raise" can only refer to new forces, "maintain" to those already in existence.

[GRIFFITH, C.J.—That is in order to cover any time that may

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elapse before the transfer to the Commonwealth. All taxes before 1901 are valid. Is not the tax struck each year when the rate is levied ?]

The *Sydney Corporation Act* makes Crown lands rateable. Therefore, unless sec. 114 of the Constitution makes them cease to be so, they remain rateable. Sec. 108 provides that "every law in force in a colony which has became a State, and relating to any matter within the powers of the Commonwealth shall, subject to this Constitution, continue in force in the State," &c., and consequently, if sec. 114 is only prospective, the State Act giving the Council power to rate is in full force. In December, 1900, there is in existence a tax upon Crown lands by virtue of an Act of the State Parliament. That is continued in force by sec. 108; *R.* v. *Bamford* (1901), 1 S.R., 337, and sec. 114 has not made it invalid.

[BARTON, J.—You are using "tax" in two senses—first, in the sense of actual liability, and secondly in the sense of power or liability to have a tax imposed.]

It is true that the power has to be exercised periodically, but if the right to tax continues, then the power to exercise it continues. The power of the State Parliament to give the Council the right to levy rates existed in December, 1900. By virtue of secs. 107, 108, it therefore still exists, unless sec. 114 has taken it away, and the Council has the right to levy rates just as it had at the date of the Constitution. Sec. 114 means only that the State cannot *pass a law* imposing a tax. The *imposing* of the tax is done when the power is given to the Council to collect the tax, *i.e.*, when the *Sydney Corporation Act* was passed. The exemption of this property from State taxation is a "matter within the powers of the Parliament of the Commonwealth," referred to in sec. 108, as appears from secs. 51 (xxxix.) and 52 (i.) Therefore the property must continue subject to all liabilities to which it was subject when taken over by the Commonwealth. In the United States it was held that the words "No State shall pass any law" interfering with obligations created by contract referred only to future laws. The words "shall impose," in our Act, should receive a similar prospective meaning. I concede that a State cannot do indirectly what it is unable to do

directly; *Fagan* v. *Chicago*, 84 Illin., 227, cited in *Van Brocklin* v. *Tennessee*, 117 U.S.R., 151, at p. 162; *Owings* v. *Speed*, 5 Wheat. (U.S.), 420; and that if a rate is a tax within the meaning of sec. 114, and a tax is only imposed when the rate is levied, the plaintiffs must fail. But I contend that the sense of the word "impose" in sec. 95 is that the imposition is the effect of parliamentary action.

Counsel then proposed to quote from the Convention Debates a statement of opinion that that section only referred to future impositions.

[GRIFFITH, C.J.—I do not think that statements made in those debates should be referred to.

BARTON, J.—Individual opinions are not material except to show the reasoning upon which the Convention formed certain decisions. The opinion of one member could not be a guide as to the opinion of the whole.]

The intention could be gathered from the debate, though it would not be binding upon the Court. The *Federalist* is referred to in American Courts.

[O'CONNOR, J.—That is as an expert opinion, or a text book. Debates in Parliament cannot be referred to.]

There is a difference between parliamentary debates and those of the Federal Convention. The latter were the deliberations of delegates sent by compact between the States.

[GRIFFITH, C.J.—They cannot do more than show what the members were talking about.

O'CONNOR, J.—We are only concerned here with what was agreed to, not with what was said by the parties in the course of coming to an agreement.]

It might be the duty of the Court to modify the literal meaning of the words if they clearly failed to express the intention of the delegates.

[O'CONNOR, J.—The people of the States have accepted it as it now stands.

BARTON, J.—You could get opinions on each side from the speeches in debate.

GRIFFITH, C.J.—They are no higher than parliamentary debates, and are not to be referred to except for the purpose of

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seeing what was the subject-matter of discussion, what was the evil to be remedied, and so forth.]

To return to sec. 114, I contend that it contains no *express* limitation of the power of a State to levy rates through the Municipal Council.

[BARTON, J.—Do you say then that it is competent either for the States or the Commonwealth to invade the domain of one another except so far as restricted expressly or by necessary implication by the laws of the Commonwealth ?]

Yes. There is nothing to prevent a State which had the power to do a thing at the time of the establishment of the Commonwealth from doing it now, except where clearly forbidden by the Constitution or by legislation of the Commonwealth in exercise of the powers conferred by the Constitution. Again, assuming that sec. 114 has no bearing upon the matter, this is property belonging to the Crown, and the Crown, by assenting to the *Sydney Corporation Act*, has given its assent to the imposition of rates upon its property for services rendered. The assent of the State Governor, when within his jurisdiction, is as effective to bind the Crown as that of the Governor-General.

[O'CONNOR, J.—Is not the "Crown" merely another name for the Executive Government ?]

Yes, but it is the Crown that assents, though it indicates its assent through an agency. This fact makes much of the reasoning in *McCulloch* v. *Maryland*, 4 Wheaton, U.S., 316, inapplicable to the circumstances of our Constitution. The Imperial Parliament deputes different executives to perform the different functions of the Crown. But it is the Crown which is behind them all. The Commonwealth is a Union of States under the Crown. This distinction between the Constitutions of the Dominion and the United States is pointed out by *Wetherby*, J., in *Town of Windsor* v. *Commercial Bank*, 14 Nova Scotia L.R. (3 R. & G., 420), at p. 424. This Court cannot read into our Constitution those great powers that were read into the American Constitution by *Marshall*, C.J., in order to preserve the Union.

[O'CONNOR, J.—*Leprohon* v. *City of Ottawa*, 2 Ont. App. Rep., 522, deals with this argument. The Canadian Courts have always followed *McCulloch* v. *Maryland*.]

There is another reason for holding that the American doctrine does not apply, viz., that our Constitution gives express protection against State encroachment. Secs. 107, 108, 109 secure the supremacy of the Commonwealth Parliament. The chief assumption of *Marshall*, C.J., was the necessity of self-preservation, the power to tax being the power to destroy, and upon that he based the doctrine of implied restriction upon the taxing powers of the States. But under our Constitution the Parliament can by legislation protect itself and prevent taxation being imposed upon its own property. It only need pass a law inconsistent with the State law, and the latter becomes invalid. It can legislate over matters and places under its jurisdiction to any extent; secs. 51 (xxxix.) and 52 (i.) (ii.). There is therefore no need to rely upon the implied power upon which *Marshall*, C.J., based his reasoning. Apart from this, there is an essential difference between the Constitutions of the United States and of the Commonwealth, in that the latter is the creature of the Imperial Parliament, whereas the former, once created, is answerable to no superior power. The chief difficulty of the framers of the Constitution there was an exaggerated alarm at the powers of the Federal Government. It was owing to this fear that the limitations in the Constitution were imposed upon the Federal Government, and not upon the States, *e.g.*, Article I., secs. 8, 10. There was, consequently, no express prohibition upon the States, like sec. 114 in our Constitution.

Van Brocklin v. *Tennessee* (*supra*), in dealing with the question of the exemption of the Federal Government and its agents from State taxation, draws the distinction between imposts which are payment for services rendered, for which the Government would be liable, and burdens which prevent the proper exercise of authority by the officers of the Government.

[BARTON, J., referred to *Osborn* v. *Bank of United States*, 9 Wheat. (U.S.), 738.]

The exemption only goes far enough to secure the free action of the agents or instruments of Government.

[BARTON, J., referred to the judgment of *Field*, J., in *Wisconsin Central Railroad Co.* v. *Price County*, 133 U.S.R., 496, and *Fifield* v. *Close*, 15 Mich., 505.]

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The basis of all the decisions is that the levying of taxes is an impairment of the sovereignty of the Union.

[GRIFFITH, C.J.—Is not the real basis the principle that the property of the Union is on the same footing as the property of foreign Governments ?]

[BARTON, J.—*Marshall*, C.J., puts it upon both grounds.]

The Federal Government here is not sovereign in the same sense as in the United States, because both State and Commonwealth are creatures of the Imperial Parliament, and by it any excess on the part of either can be restrained.

[O'CONNOR, J.—But we must have ordinary, everyday, working checks, not revolutionary ones. In that view the American doctrine applies in full force.]

I suggest revolutionary remedies, because the imagined complications that they are to meet are revolutionary.

The other ground taken by *Marshall*, C.J., is that taxation by a State of federal property, being in derogation of sovereignty, can only be imposed with the assent of the Federal Government. Here the Crown has expressly assented to the tax by authorizing the Government of New South Wales to confer the power of levying rates. There could be no parallel to this in the United States, because before 1789 there was no property owned by the Union or a predecessor of the Union. So there was no necessity to provide for the continuance of the State laws as to burdens upon such property. Here, however, the ownership has not changed, the Crown is still the owner. The liability to pay rates being an incident of the ownership of the property must pass with it unless repudiated. There is thus a contract by the Crown to pay rates, and there is nothing in the Constitution abrogating it. The rate in this case is not within the mischief aimed at by the American decisions; it is reasonable, and, being a payment for services rendered, voluntarily undertaken by the Crown, is not an impairment of sovereignty. It has always been paid hitherto without any hindrance to the performance of the functions of Government.

[GRIFFITH, C.J.—Your argument would make it a question of fact for the jury in the case of each tax, whereas it must be a question of law.]

The fact of its having been paid for so many years without inconvenience is proof that it is no impairment of sovereignty. There is no inconvenience or confusion caused by continuing the State power to tax in this case.

[BARTON, J.—The power, if it continues, must be without limit.]

The Councils are limited to two shillings in the £, and sec. 114 would not permit any increase. The liability is really based upon a contract between the Municipal Council and the occupiers of Crown lands, and the benefits and burdens attach to the land in the hands of every purchaser. In *Railroad Co.* v. *Loftus*, 105 U.S.R., 258, it was held that the exemptions were continued to all subsequent holders of land. By analogy the burdens should continue also, at any rate until the contract is rescinded, as it could be here by express federal legislation; *Fort Leavenworth Railroad Co.* v. *Lowe*, 114 U.S.R., 525.

The validity of State laws does not continue, as sec. 108 provides that it shall, if it can be whittled away by saying that although the land described is subject to rates, there is no such land to rate.

[BARTON, J.—The reasons that apply in the case of property not hitherto liable apply equally to the levying of rates that were previously imposed, or to which the land was previously subject.]

The States are to be saved as much as the Federal Government. In America the object of the Courts was to preserve the Federal Government from attacks that were made upon it. Here there is a written Constitution containing adequate safeguards, and it is not necessary to go outside the words of the Act. There is therefore no need for the doctrine of implied restraint.

[GRIFFITH, C.J.—Do you contend that apart from sec. 114 the States have power to tax federal property?]

No. I say that the liability already exists and continues until removed. The Federal Parliament can consent by implication as well as expressly. By its silence it has assented.

[GRIFFITH, C.J.—I take the "consent" in sec. 114 to mean the passing of an Act agreeing to pay State taxation.]

The result of holding this property not to be liable would be

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to take away a right to levy rates which the State Act has expressly conferred upon the Council.

[GRIFFITH, C.J.—A new kind of property has come into existence which cannot be taxed by the State.

O'CONNOR, J.—Land ceded to the Commonwealth ceases to be a part of the State.]

Even if that is so, sec. 108 meets the case; *R.* v. *Bamford* (*supra*). Nothing but the doctrine of implied restraint can take away this right, and that can only be resorted to in case of necessity, and in the absence of express provision. Parliament could pass the exempting Act before taking over the land.

[GRIFFITH, C.J.—But you have to establish that there is power in the State to tax the Commonwealth, because the rate is levied upon the occupier.

BARTON, J., referred to *Thomson* v. *Pacific Railroad Co.*, 9 Wall. (U.S.), 579, at p. 591.]

In applying the doctrine of implied restraint the question is: Does the tax in fact impair the power of the Federal Government to perform its functions; *Railroad Co.* v. *Peniston*, 18 Wall., 5; *Western Union Tel. Co.* v. *Massachusetts*, 125 U.S.R., 530, at p. 550. The implied limitation must be given a reasonable construction, and only applied where there is an impairment of sovereignty.

[BARTON, J.—The principle running through the American cases on this point is that even where there is no substantial impairment the question to be considered is whether there is or is not a tendency to impair, and that where there is any impairment, however slight, it is prohibited, because it may be extended without limit, inasmuch as, where there is a power, there is a possibility of an extreme exercise of the power.]

The exaction of payment for services rendered is not a tax that will be prohibited under this doctrine; *Husé* v. *Glover*, 119 U.S.R., 543; *Transportation Co.* v. *Parkersburg*, 107 U.S.R., 691.

[GRIFFITH, C.J.—You say that both State and Commonwealth legislatures may have power to legislate in respect of this subject-matter, as indicated in sec. 109, and that until the Commonwealth legislates the law of the State prevails. That assumes the capacity of State and Commonwealth to pass laws

dealing with it. Now there can be no "inconsistency" of laws except in cases—(1) where the Commonwealth has exclusive power of legislation, or (2) where the power of the State to legislate continues concurrently with that of the Commonwealth. How does taxation come within either of these cases ?]

The land rated is within the exclusive jurisdiction of the Commonwealth by sec. 52 (i.) (ii.) It is land "vested" in the Commonwealth. The Commonwealth could legislate so as to prevent the taxation of this land by the State, not by an Act pronouncing the State law invalid, but by one inconsistent with the State law, which by sec. 108 continues in force until that is done. Abuse of power by the State in the meantime is prevented by sec. 114.

[GRIFFITH, C.J.—Can you say that municipal taxation under State laws is a matter within the concurrent or exclusive jurisdiction of the Commonwealth ? It seems to me a confusion of thought to say that to regulate the taxation of property *by a State* is within the jurisdiction of the Commonwealth.]

I mean that it is within its exclusive jurisdiction to regulate the user of it—to fix the amount of rates. The Commonwealth might agree to pay rates, or to pay them only up to a certain amount, and that would be regulation.

Drake, A.G. for the Commonwealth (*Dr. Cullen* and *J. J. Cohen* with him), for the defendant. The rate is a tax. The power of taxation is an essential and inherent power of sovereignty, and is co-extensive with its area; *Black, Constitutional Law*, p. 375. The necessary independence of the Federal and State Governments limits their respective powers of taxation, *ibid.*, p. 378. The chief authorities on the point are the American and Canadian cases. The instruments, means and agencies of the Federal Government, as well as all property belonging to it, no matter for what purpose it is used, must be free from State burdens; *McCulloch* v. *Maryland*, 4 Wheat. (U.S.), 316; *McGoon* v. *Scales*, 9 Wall. (U.S.), 23. The converse is equally true, that the Federal Government cannot, by its revenue system, defeat the operations of the State Governments within their legitimate sphere; *National Bank* v. *Commonwealth*, 9 Wall. (U.S.), 353; *Railroad Co.* v. *Peniston*, 18 Wall. (U.S.),

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29. The fact that land is not liable to seizure makes no difference in the character of the law. All taxation except a capitation tax is a tax upon an individual in respect of either his property or his earnings. If the tax is upon an individual in respect of his land it may be called a land tax, but it is the individual, the owner or occupier, who is liable; *Dobbins* v. *Erie County*, 16 Peters, 445. The raising of taxes by a city or town for its support is as much an exercise of the taxing power as where raised by a State for its own support. The State acts by and through the municipal governments; *Gilman* v. *City of Sheboygan*, 2 Black (U.S.), 510; *Knowlton* v. *Supervisors of Rock County*, 9 Wisc., 410. So, in this case, the rates must be regarded as imposed by the Government of New South Wales. The rate here is not a compensation for services rendered. Sec. 128 of the *Sydney Corporation Act* 1902, provides for special rates being raised for special purposes. The rate in question is not under that, but under the section providing for general rates. A special assessment must be regarded in the same light as general rates, *i.e.*, as "taxation"; *per Field*, J., in *Wisconsin Central Railroad Co.* v. *Price County*, 133 U.S.R., 496. It has only been held not to be a tax where it is actually a payment for services rendered. The distinction has been clearly defined in *State Tonnage Tax Cases*, 12 Wall. (U.S.), 204; *Peete* v. *Morgan*, 19 Wall., 581; *Cannon* v. *New Orleans*, 20 Wall. (U.S.), 577; *Packet Co.* v. *Keokuk*, 95 U.S.R., 80; *Harman* v. *Chicago*, 147 U.S.R., 396, in which *Field*, J., at p. 410, distinguishes *Husé* v. *Glover* (*supra*); *Western Union Tel. Co.* v. *Massachusetts*, 125 U.S.R., 530; and in many later cases. These were all cases of private companies doing business both in the State that imposed the tax and in other States. They were held liable to State taxation only in respect of their local occupation and business, as in *City of St. Louis* v. *Western Union Tel. Co.*, 148 U.S.R., 92. Levying a charge upon such a corporation greatly in excess of the cost of the services rendered was held to be a tax, and the ordinance imposing it void; *Philadelphia* v. *Tel. Co.*, 40 Fed. Rep., 615. The rate in question is therefore a tax upon the Commonwealth in respect of property owned, held and occupied by it, and is prohibited by sec. 114.

[BARTON, J.—The strongest argument against you is that that section is prospective only.]

I contend that, assuming this section to be prospective, the tax is imposed whenever the rate is struck. The limit was fixed by the Statute, but the actual rate, varying within that limit, is imposed each year. The word "impose" is used in two senses, one meaning the passing of the Statute imposing the tax, and the other the levying of it or making it payable upon particular property, just as in the imposition of duties of customs upon certain goods. Municipalities are simply auxiliaries of the State, and the State imposes a tax every time that they levy a rate. As for the contention that the liability continues until the Commonwealth puts an end to it by legislation, I say that by no legislation could the Commonwealth give effect to or alter the effect of sec. 114. It begins to operate from the date of the establishment of the Commonwealth, and prohibits any subsequent exercise by a State of the rating power upon Commonwealth property. In *Fort Leavenworth Railroad Co.* v. *Howe* (*supra*), the land sought to be taxed was land that had been ceded subject to certain exemptions, and it was held to be liable only when used for State purposes, but exempt when used for Federal purposes. The case depended entirely upon the terms of cession. In *Van Brocklin* v. *Tennessee* (*supra*), it was held that if the title to the land was in the Federal Government the land was not taxable by the State. There is in the American Constitution no section corresponding to sec. 114 in ours, but the States admitted to the Union later were admitted under agreements that lands of the Union should not be taxable, and that was embodied in the Constitutions of those States. In the case of the original States there was an implied provision to the same effect.

As to the contention that these are Crown lands which the Crown has allowed to be taxed, the New South Wales Statute must be taken to have referred only to Crown lands within the jurisdiction of that State. Crown lands that have passed to the Commonwealth are as much out of its reach as if they were within another State. To hold otherwise would be to render the provisions in the Constitution providing for the transfer of lands from one owner to another meaningless.

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[GRIFFITH, C.J.—The whole scope of the Constitution shows that a distinction is made between the different Governments as different entities.]

(He was stopped on this point).

An argument was based on sec. 84, that the Crown has contracted with the municipality that rates should be paid, and that, as the Crown still holds the land, there is a "current obligation" attaching to it in the hands of the Commonwealth. But the municipalities are mere instrumentalities of the State. They have no vested right in powers given them by legislation. The State can at any time take away the powers it has conferred, and it has done so by accepting the Constitution. Sec. 114 has taken away the power to tax lands held by the Commonwealth, and it is no answer to say that there was a previous contract to allow them to be taxed. [He cited on this point *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat., 519; *Meriwether* v. *Garrett*, 102 U.S.R., 472].

Sec. 108 does not help the argument. It can only refer to such matters as must be provided for in the interval between the establishment of the Constitution (Commonwealth) and legislation by the Parliament, *i.e.*, management of departments and so on. Its language is wholly inapplicable to the taxation of land.

[GRIFFITH, C.J.—I can see no possibility of there being any "inconsistency" between the powers of taxation by a State and the power of taxation by the Commonwealth. Taxation by the one authority is not inconsistent with taxation by the other.]

The doctrine of necessarily implied restraint is as applicable to our Constitution as to that of America. There is nothing peculiar in our circumstances. There has never been any attempt, even in modern times, to impeach the doctrine of *McCulloch* v. *Maryland* (*supra*). It was adopted and affirmed in 1886 in *Van Brocklin* v. *Tennessee* (*supra*), and in 1898 in *Owensboro' National Bank* v. *Owensboro'*, 173 U.S.R., 664, at p. 676; *Grenada County* v. *Brogden*, 112 U.S.R., 261. Canada has adopted it, *Leprohon* v. *Ottawa*, 2 Ont. App. Rep, 526, in 1876-8. The plea raised here that rates are payment for services rendered has often been raised in America, but held to be no answer; because it could always be

said that the levying of a rate was in a sense a payment for benefits received. It is a tax nevertheless.

[GRIFFITH, C.J.—We may take it that the law as declared in that case is settled law in Canada.]

There are many cases dealing with the different kinds of interference with the Federal service which will be restrained; *Coté* v. *Watson*, 2 Cartwright, 343, in Canada, and in New Brunswick the following cases:—*Ex parte Owen*, 20 New Br., 487; *Ackman* v. *Town of Monckton*, 24 New Br., 103; *Coates* v. *Town of Monckton*, 25 New Br., 605; *Ex parte Timothy Burke*, 34 New Br., 200; *Ex parte Killam and others*, 34 New Br., 530. The Municipal Council in this case, in default of payment, could issue a distress warrant, and seize any Commonwealth property anywhere in the city, not only on the premises. There could not be a stronger case of interference with the operations of the Commonwealth. Even if there were no express prohibition, the State could not be allowed to tax the Commonwealth property in such a way as to impede the operations of the Government.

Again: the State Act should be construed in such a way as not to include Commonwealth property. It could not be the intention of the State legislature to allow taxation of land outside their jurisdiction. The State Act need not be made invalid, but may receive its full effect, the only question being how much it includes. It must be read subject to the Constitution: *Grenada County* v. *Brogden* (*supra*); *Black, Constitutional Law*, p. 60; but is good as far as it does not conflict with it. "All lands" must be construed as excluding Commonwealth lands. When the original State Act was passed there were no Commonwealth lands in existence, and the *Consolidating Act* of 1902 cannot be taken to have extended its operation.

Dr. Cullen followed. The prohibition in sec. 114 applies to the exercise of powers under Acts already in existence, as well as to the passing of Acts in the future. It is not only a particular way of doing the thing that is prohibited, but the doing it in any way. Any tax that is in any way burdensome is included; *Brown* v. *Maryland*, 12 Wheat., 419, at p. 442. Even if we assume that the tax was imposed at the time of the passing of the *Sydney Corporation Act* and not at the date of levying this

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rate, it makes no difference. Sec. 114 cannot have only a prospective effect. The only logical way to read it is as a repeal *pro tanto* of the *Constitution Act* of New South Wales. That Act gave power to the Government of New South Wales to tax property within its boundaries. In the exercise of that power various taxing Acts have been passed. The *Commonwealth Constitution Act*, coming later, being clearly contradictory of the exercise of that power in respect of Commonwealth property, must operate to prevent its further exercise, not only in the way of passing new taxing Statutes in respect of such property, but also in the way of raising taxes under Acts previously passed. If it had been the intention of the framers of the Constitution to preserve those powers they would have used different words. They had before them an example of a section intended to preserve powers previously conferred, and to continue the exercise of those powers, in sec. 41 of 18 & 19 Vict., c. 44, which preserves laws passed under the old *Constitution Act* of New South Wales, 9 Geo. IV., c. 83. If, therefore, it had been intended to merely substitute new for old, some such section as sec. 41 would have been used. But here we have the creation, by an Act of the same Parliament that created the old, of a new legislature with co-ordinate powers. Thus there are two Constitutions existing side by side, and one of them may impinge upon the other. In such a case the later Act, where it conflicts with the earlier, must operate as an implied repeal of the earlier. State laws must be invalid to that extent. We should thus expect to find the section preserving State powers framed in such a way as not to cut down the powers conferred upon the Commonwealth by the Constitution. This we find in sec. 108, which has preserved the powers of the States, but "*subject to the Constitution*." It cannot therefore be argued that it was intended to preserve powers, the exercise of which would be directly in conflict with an express provision in the Constitution; sec. 114. Again: to make sec. 108 applicable, the plaintiffs must show that there were concurrent powers in State and Commonwealth to legislate over some particular subject-matter. The subject-matter here is the taxation of Commonwealth property. But it is absurd to talk of the Commonwealth *having power to tax its*

own property, and to say that the States have a concurrent power over the same subject-matter. Suppose, however, that it has been established that the subject-matter is within the concurrent powers, and that the State can legislate with respect to it, still sec. 108 does not help the plaintiffs, because there is still the limitation contained in the words—"subject to the Constitution," and we have the express prohibition in sec. 114, and the clear statement in covering clause 5, that the Constitution must override the laws of the State. The only other hypothesis upon which it could be contended that the State has power to legislate upon this subject-matter is that it is within the exclusive power of the State. This is clearly not so. The result is that, the power to legislate upon it having been withdrawn from the State, the laws made under that power are also withdrawn. The word "impose" in sec. 114 is wide enough to include both a new law creating a tax, and one carrying into operation an old law authorizing the levy of rates. To forbid Parliament to carry into effect an existing law is a repeal *pro tanto* of that law. The Imperial Parliament has done no more than was done by the Parliament of New South Wales, when it made the land of the Railway Commissioners and property of the Harbour Trust exempt from municipal rates. But in each case the *Corporation Act* remains effective over all subject-matter within its sphere. Again, even supposing that sec. 108 applied, the powers of the Commonwealth with regard to taxation are limited to this extent, that it cannot impose taxation "so as to discriminate." There must be the same limitation upon its power to assent to taxation as upon its power to tax. To assent to the taxation of its property by municipalities in New South Wales is to discriminate in their favour.

The position of the Commonwealth is not made different from that of the United States by the fact of the Crown being behind both the Commonwealth and State Governments. The Imperial Parliament evidently treated the Governments of State and Commonwealth as different juristic persons, different entities. The only effect of a decision to the contrary would be to add a few more words to every case where mention is made of the respective Parliaments, just like the effect of the *Statute of Uses*

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upon conveyances in England. It would be "the Crown as represented by the Commonwealth," and "the Crown as represented by the State Parliament." "The Crown" in one State cannot mean the same person in fact as "the Crown" in another State. In the Dominion of Canada, where disputes arise between bodies representing these different functions of the Crown, the parties are The Attorney-General of the one *v.* The Attorney-General of the other, and the Privy Council has recognized the distinction. In the United States the people take the place occupied by the Crown in the British dominion; but that fact does not make the doctrine of implied restraint inapplicable here. Congress is one legislature and the State Parliament another, and the assent of the one is not the same thing as the assent of the other, in matters over which they respectively exercise jurisdiction. So here the Crown gives up part of its prerogative to the various State governments, and it can only give up the exercise of its prerogative in one State to the government of that State. One State can no more impose burdens upon another State in the exercise of powers conferred by the Crown than one State can upon the Commonwealth.

[GRIFFITH, C.J.—The surrender of a prerogative to the States, or to any of them, is not a surrender to the Commonwealth.]

In each case where the Crown is bound by Statute it must be enquired how far that particular government can purport to bind the Crown. It is clear that it can only do that within the limits of the jurisdiction conferred upon it by the Crown. It cannot bind co-ordinate governments.

[BARTON, J.—*Marshall*, C.J., in *Osborn* v. *Bank of United States*, 9 Wheat., 738, puts your contention very clearly.]

The contention of the plaintiff here is not that only an individual, a citizen of the Commonwealth, is bound, but that the Commonwealth Government itself is bound. The American cases refer to attempts to impose burdens upon individuals, so that there is no necessity to resort to the whole of the reasoning there used.

[GRIFFITH, C.J.—Nobody seems to have had the courage to endeavour to impose burdens upon the Federal Government in the United States in so many words.]

The doctrine of *McCulloch* v. *Maryland* is applicable whenever there are co-ordinate powers existing in different governments.

[BARTON, J.—The Attorney-General for New South Wales contends that sec. 114 does away with the relevancy of the doctrine. It seems to me, however, that the exemption comes within the powers included in the grant. Where a power is granted, every other power is granted, the denial of which would make the grant of power nugatory.]

[*Wise*, K.C.—Immunity from taxation may not be such a power.]

[BARTON, J.—I think so, on clear reasoning, not merely on the authority of the American decisions. The Crown may make grants, for instance, of moneys that purport to be levied as taxes.]

The Constitution has introduced a new government, which cannot be bound by State legislation. In Canada the Dominion Government has power to disallow provincial Acts. That is some protection certainly, but it is not the only one. The Dominion Court in Canada and the High Court here are the authorities to decide constitutional questions in the last resort (sec. 74 of the Constitution). The decision is not to be left to those who may happen to be in office at the time. Each government is supreme in its own sphere; *Hodge* v. *The Queen*, 9 App. Cas., 117; *Powell* v. *Apollo Candle Co. Ltd.*, 10 App. Cas., 282. That cannot be so if it is liable to be attacked by other Parliaments from time to time.

Sec. 114 is inserted in order to prevent State Parliaments from taxing the Commonwealth through its property, but it was never contemplated that a direct tax would be attempted upon the Commonwealth Government itself. The section therefore prohibits the tax *in rem*, inasmuch as that might possibly be attempted on the ground that the land was within the territorial limits of the States. But it is really the Commonwealth which is being taxed here, and therefore the doctrine of *McCulloch* v. *Maryland* applies.

Wise, K.C., in reply. It is not for the plaintiffs to point to

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statutory authority for the State to tax this land; the onus is on the defendants to point to some part of the Constitution taking away the statutory power of the State to impose the tax. If, however, I am required to discharge the onus, I point to the *Sydney Corporation Act*. If the land is Crown lands it is rateable under that Act; if it is Commonwealth property it is not within the exemptions, and the defendant must show some section in the Constitution which takes away the power to rate. That must be done by clear words, because in no other way can the sovereign power of the State to tax be taken away. "Tax" here must be understood in the sense in which it is used in England. That would not include a rate. The word "State" also must be literally construed, and not read so as to include a municipality. The prohibition in sec. 114 must therefore be strictly read to apply only to the imposition of taxes by a State and not to the levying of rates by a municipality. The words are clear, and, even if they left it doubtful whether rates were, or were not, included in the prohibition, sec. 108 would make it clear that they were not intended to be so included, because by that section current liabilities are saved. The words of sec. 114 being clear, the American doctrine of implied restriction is inapplicable. The Court will not adopt it here unless it is absolutely necessary. *United States* v. *Cornell*, 2 Mason (U.S.), 50, gives an instance of the difficulty which the American judges had to face, and it is met here by sec. 108; *R.* v. *Bamford* (*supra*). Even on the American cases the mere fact of the land being the property of the Commonwealth Government will not render it exempt from rates, assuming that they do not come within sec. 114; *Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U.S.R., 525. Moreover, the Imperial Parliament can interfere, if necessary, to prevent destruction of the instruments of the Commonwealth, whereas in America, unless it could be regarded as implied in the Constitution, such a safeguard could nowhere be found. Certain powers have been conferred by the Imperial Parliament by Statute upon States and Commonwealth, on the assumption that they would be exercised reasonably. The undue exercise of these powers can be restrained by the Parliament which conferred them, but the Court cannot go outside the terms

of the Statutes in order to impose a further restraint upon them.

As to the difficulty caused by part of the rates claimed having been levied under the *Consolidating Act* 1902, it is admitted by the special case that all the rates are to be treated as on the same basis, and there is to be no distinction between the amount claimed in respect of rates levied before 1902 and those levied later.

Cur. adv. vult.

26th April.

GRIFFITH, C.J. In this action the Municipal Council of Sydney claims to recover from the Commonwealth municipal rates in respect of land situate within the City of Sydney, and occupied by the defendants for the purposes of the Departments of Customs, Posts and Telegraphs, and Defence, the land having become vested in the defendants by virtue of sec. 85 (1) of the Constitution upon the transfer of those departments to the Commonwealth. The defendants claim that the rates in question, which were made since the date of transfer, are within the prohibition of sec. 114, which provides that "a State shall not without the consent of the Parliament of the Commonwealth . . . . impose any tax on property of any kind belonging to the Commonwealth." For the plaintiffs it is contended, first, that a municipal rate is not a tax within the meaning of sec. 114, and, secondly, that, if it is, the provisions of the *Sydney Corporation Act* 1879, by which (sec. 103, re-enacted as sec. 110 of the *Sydney Corporation Act* 1902) (1902 No. 35) Crown lands were expressly declared to be liable to rates, were continued in force by sec. 108 of the Constitution until the Parliament of the Commonwealth should think fit to legislate in a contrary sense, when, it is said, the provisions of sec. 109 of the Constitution would come into operation, and the State law, being inconsistent with the Federal law, would cease to have effect. No such Federal law has yet been passed. A subsidiary contention was that, in determining whether the rate, assuming it to be a tax within the meaning of sec. 114, was valid or not, regard should be had to the date of the passing of the New South Wales Statute, and not to the dates when the particular rates in question were made, and that, therefore, the rates for 1901 and 1902, made under the Act of 1879, which was passed before the

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establishment of the Commonwealth, were valid, even if those made under the Act of 1902 were invalid, which, however, was not conceded. There can be no doubt that the right of taxation is a right of sovereignty. It may be exercised upon all persons, and in respect of all property, within the jurisdiction of the sovereign power which exercises it. Municipal taxation springs from this sovereign right, and is an exercise of it by delegation to the municipality. No other origin for it can be suggested. It follows that if the authority which assumes to create such a delegation does not itself possess the power, the delegation is void, since the spring cannot rise higher than its source. A municipal corporation, therefore, cannot have any greater power to impose taxation than the State by which it is created, and by which its own powers are conferred. It is true that the word "tax" is sometimes used in the limited sense of an enforced levy for the purposes of the general government, but, if a State itself has no power to make such a levy, it cannot confer the power under another name. In a constitutional instrument, therefore, defining and limiting the power of constitutional authorities, the word "tax" must be construed in the wider sense, and a prohibition of the imposition of a tax must be held to include a prohibition of any such imposition by a delegated authority, by whatever name the tax is called. The *Sydney Corporation Act* does not, of itself, purport to impose rates, but merely requires the Municipal Council to make an annual assessment of the values of land within the municipality, and to make an annual rate of such amount as they think proper, within prescribed limits. The grant of the power, which is the act of the State, and the exercise of the power, which is the act of the corporation, are essentially different. The Statute operates as a delegation of the taxing power of the State, coupled with a direction when and how to use it. The assessment of land and the striking of a rate together operate as municipal legislation in exercise of the power. It is clear, therefore, that under this Act the imposition of a rate is the act of the corporation, and not of the State, and that the tax is imposed from time to time when the rate for the year is made. It follows that the prohibition of sec. 114, if applicable, applies to the rate for every year in which it is sought to levy it.

It is manifest from the whole scope of the Constitution that, just as the Commonwealth and State are regarded as distinct and separate sovereign bodies, with sovereign powers limited only by the ambit of their authority under the Constitution, so the Crown, as representing those several bodies, is to be regarded not as one, but as several juristic persons, to use a phrase which well expresses the idea. No better illustration can be given than is afforded by the lands now sought to be rated, which, having originally been "property of the State," *i.e.*, lands of the Crown in New South Wales, have become "vested in the Commonwealth," *i.e.*, vested in the Crown in right of the Commonwealth. The change in constitutional ownership is accurately and unmistakeably denoted by the language of sec. 85 in which it is expressed.

The term "the Crown" as used in the *Sydney Corporation Act* must be taken to mean the Crown in its capacity as representing the State of New South Wales. In the Act of 1879, passed before the establishment of the Commonwealth, it obviously had that meaning, and no wider one can be given to it in the re-enactment of 1902. The argument, therefore, sought to be founded upon the assent of the Crown, given through the Governor of New South Wales, to the taxation of Crown lands, fails, since land vested in the Commonwealth or in the Crown in right of the Commonwealth is not Crown land within the meaning of the Sydney Act. Nor, in my judgment, can the liability of the land, while Crown land of New South Wales, to municipal taxation be regarded as a liability running with the land, any more than if the land had afterwards been granted for a purpose which would exempt it from such liability.

It was pointed out in the argument that under the Sydney Act the municipal rates are not, as in some municipal Acts, such as that which we had to consider in *Borough of Glebe* v. *Lukey* (*ante*, p. 158), made a charge upon the land, but are a personal liability of the owner or occupier, and may be levied by distress upon the chattels found upon the land. But this distinction does not affect the substantial character of the imposition, which is a tax in respect of property. All such taxes primarily impose a personal liability upon individuals, and it is, in my opinion, immaterial whether the land does or does not itself become

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subject to a charge in the nature of an encumbrance. In either case the tax is in substance a "tax on property" in the sense in which these words are commonly understood, and certainly in the sense in which they are used in sec. 114 of the Constitution.

With regard to the argument founded on sec. 108, it is to be remarked that the section by its express terms applies only to laws of a State "which relate to matters within the powers of the Parliament of the Commonwealth." These matters are, in my opinion, those enumerated in secs. 51 and 53. The law in question is one relating to the imposition of municipal taxation under the authority of the State. I am quite unable to see how such a matter can, in any sense, be regarded as one within the powers of the Parliament of the Commonwealth. It is true that one of the powers of that Parliament is to make laws with respect to taxation. But the taxation referred to is federal taxation for federal purposes. It was, however, suggested that, as the State may with the consent of the Commonwealth Parliament impose taxes on the property of the Commonwealth (sec. 114), their consent may be regarded as a matter "within the powers of the Parliament," seeing that it may be either given or withheld. In my judgment, however, the consent intended by sec. 114 is a consent expressed by some positive action on the part of the Parliament, not one to be tacitly inferred from its inaction. Parliament, which is a legislative body, ordinarily expresses its will by a legislative Act, and there is nothing in the section itself to suggest that the prohibition, which is direct and explicit, can be withdrawn in any other way. While, however, the consent required to validate State taxation, as such, of Commonwealth property must be given by Statute, the same practical result, in a pecuniary sense, might, no doubt, be effected by the appropriation of money to an amount equal to the rates which would be imposed on the same property if it were liable to taxation.

The Act of 1879 continued therefore in force "subject to the Constitution," that is to say subject to the prohibition of sec. 114, and the Act of 1902 is subject to the same prohibition.

If the tax is considered as merely a tax upon the Commonwealth regarded as a juristic person, or upon its officers as persons —a view which for reasons already given I think erroneous—

other considerations would arise. In that view, the question for discussion would be whether a State, or a delegated authority within a State, has power to affect the Commonwealth or its officers in the performance of the duties cast upon them by the Constitution or by the laws of the Commonwealth. The answer to this question depends upon the further question whether, under the Constitution of the Commonwealth, the jurisdiction of the States extends to the Commonwealth regarded as a juristic person, or to its officers in the performance of their duties as such officers. On this point my opinion is sufficiently expressed in the judgment in the case of *D'Emden* v. *Pedder* (*ante*, p. 91.)

For these reasons I am of opinion that the rates sought to be recovered in this action are taxes within the meaning of sec. 114 of the Constitution, that they are taxes imposed upon property, and that the imposition of them upon property of the Commonwealth is prohibited by the express words of sec. 114 of the Constitution. I am of opinion further, for the reasons given in that case, that sec. 110 of the Sydney Act of 1902 should be construed as not applying to the lands in question.

Judgment must therefore be given for the defendants.

BARTON, J. I have had the advantage of reading the opinion just delivered by the *Chief Justice*, and I strongly concur in it. I desire, however, to add a few observations.

In the case of *Wisconsin Central Railroad Co.* v. *Price County*, 133 U.S.R., 496, reported in 1889, the opinion of the Supreme Court of the United States, delivered by *Field*, J., opened with the following passage :—"It is familiar law that a State has no power to tax the property of the United States within its limits. This exemption of their property from State taxation—and by State taxation we mean *any taxation by authority of the State, whether it be strictly for State purposes or for mere local and special objects*—is founded upon that principle which inheres in every independent government, that it must be free from any such interference of another government as may tend to destroy its powers or impair their efficiency. If the property of the United States could be subjected to taxation by the State, the object and extent of the taxation would be subject to the State's discretion.

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It might extend to buildings and other property essential to the discharge of the ordinary business of the national government, and in the enforcement of the tax those buildings might be taken from the possession and use of the United States. The Constitution vests in Congress the power to 'dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' And this implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise."

This exemption from State taxation is essential to the preservation of the powers granted to the United States by the Constitution, and it would exist even were it not buttressed by the provision quoted by *Field*, J. A similar exemption is essential in the case of the Commonwealth, and the Australian Constitution contains provisions which are by way of security analogous to, and by way of express exclusion, even stronger than, those of the 3rd section of Article IV. of that of the United States. See Commonwealth Constitution, sec. 53 (i.) and (ii.) But in order that this particular matter may not be allowed to rest merely on a clear principle of construction, our own Constitution goes on to provide in its 114th section that "a State shall not, without the consent of the Parliament of the Commonweath . . . . impose any tax on property of any kind belonging to the Commonwealth," while the Commonwealth is in its turn forbidden to tax property of any kind belonging to a State.

It is argued, however, that a general rate imposed under the *Sydney Corporation Act* of 1879, consolidated in the Act of 1902, is not a tax within the meaning of sec. 114. That contention has been fully disposed of by the *Chief Justice*. It is further contended that the State Act is protected by sec. 108 of the Constitution. As a municipal rates Act does not "relate to any matter within the powers of the Parliament of the Commonwealth," sec. 108 can hardly apply. But, independently of sec. 108, the State Act is valid and uninterfered with by the Constitution in respect of all the subject-matter to which it can properly apply. Is this property part of the subject-matter? When lands are by the operation of the Constitution taken from

a State and vested in the Commonwealth they are, with the department which uses them, transferred from State to Commonwealth, from the one government to the other. They may still be called lands of the Crown, but the sense in which they are Crown lands is not the same. If this were otherwise, it would have been absurd to provide, as the Constitution does in sec. 85 (iii.), that "the Commonwealth shall compensate the State for the value of any property passing to it under this section," and that "if no agreement can be made as to the mode of compensation, it shall be determined under laws to be made by the Parliament." One can understand the Commonwealth compensating the State, or agreeing with it as to the mode of compensation. But compensation made by the Crown to the Crown, or an agreement made by the Crown with itself, is in either case an operation which baffles comprehension. Similarly if the argument for the plaintiff corporation were followed, sec. 85 (iv.) would become meaningless, for how can the Crown relieve the Crown by assuming its own current obligations? And many other provisions of the Constitution would in like manner lose all sense and meaning. I am of opinion, therefore, that, upon the properties in question becoming vested in the Commonwealth, they ceased to be part of the subject-matter of the *Corporation Act*, and so ceased to be rateable under that Act as lands of the Crown, and that the Act did not and could not subject them as lands of the Commonwealth to the liability which it could and did place upon them when they were lands of the State.

But the argument on the part of the plaintiffs goes to the length that the *Corporation Act* of 1879 operated on those properties because it was passed in the exercise of a power which existed before Federation, and was preserved by sec. 107, and that the *Consolidation Act* of 1902, similarly operates as a renewed exercise of the same power. Now as no power to tax property of the Commonwealth existed before Federation, it is hard to see how any such power "continues" within the meaning of sec. 107, which was framed for the purpose of ensuring that certain powers should be kept alive, not for the purpose of creating new ones. So that I do not see how sec. 107 helps the plaintiff corporation.

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Indeed I fail to perceive how any of the arguments as to the "continuance" of powers and of laws under secs. 107 and 108 can avail to establish the claim for these rates, for I agree in thinking that it is not the *Corporation Act* itself which imposes the rate, *i.e.*, the tax. The Act gives power to impose it, and directs an annual assessment and rate. It is not until a property has been included in an assessment, and a rate has been struck, that the rate can be held to be imposed on that property. The assessments and rates, *i.e.*, taxes, with which the Court is now concerned, relate to periods following the 1st January, 1901, when the people of these States became united in a Federation. The taxes, therefore, which are claimed in this case, were "imposed" after Federation, and even if we concede the plaintiff's contention that sec. 114 was intended to prohibit only that taxation which at the date of Federation was in the future, these taxes come within the express prohibition, and are quite unentitled to any protection under sec. 107 or sec. 108, while it seems to me, for the reason given by the *Chief Justice*, that the condition of obtaining the consent of the Parliament of the Commonwealth has in no way been performed. Holding the view that the "imposition" of taxation with which we are at present concerned has taken place since Federation, I consider also that, apart from the express prohibition of sec. 114, the arguments of *Marshall*, C.J., in *McCulloch* v. *Maryland*, could if necessary be urged with much force in this case. At any rate, I venture for myself to adopt the statement and the reason of *Field*, J., in the passage cited at the outset of my opinion. I wish to avoid any implication which might be drawn from my silence that I agree with Mr. Wise's argument that the maxim "*expressio unius est exclusio alterius*" can be so applied to sec. 114 as to defeat the operation of what are called the implied powers of the federation. Such admission would be disastrous to the very existence of this Commonwealth, and is the last intention of all to be imputed to its framers. Most of its expressed power would at once become subject to swift destruction or gradual attrition within the several States in proportion to the extent to which a judicial license to invade the sphere of the general government might be acted on, with motives however laudable, under cover of State legislation. In my view the prohibition in sec. 114 was for

greater emphasis and for unmistakeable clearness, and was in no sense inserted for the purpose of stifling the reasonable and obvious inference that the grants of power to the general government carried with them every right necessary to their preservation and defence—rights not to be mistaken for any authority to usurp or destroy.

Here I am led, before concluding, to refer to a suggestion which came from the Attorney-General for New South Wales in the course of his able argument. He rather disputed the applicability, in point of reason, to our circumstances, of some of the opinions of American jurists on questions of the interpretation of constitutional enactments. He pointed out that in some judgments reference was made to the possible consequences of decisions which would give license to invasions of the sphere of the Federal Government, the consequences of which might amount to the dissolution of the American Union. He inferred that the judgments of the time were given in fear that contrary decisions might bring about that result, with its dreaded attendant, in the shape of civil war. Attentive perusal of these great deliverances will dispel the notion that consequences which were pointed out as possible, were the impelling reasons of their utterance. In discussing questions of the relative powers of the Union and the State, the exposition of their Constitution by American jurists, whether in their judgments or their commentaries, has always been founded on those principles of construction which have been equally adopted as guides by British lawyers. This truth cannot be better stated than as Professor Dicey puts it in the introduction of his *Law of the Constitution*, 5th ed., at p. 5: "The American lawyer has to ascertain the meaning of the Articles of the Constitution in the same way in which he tries to elicit the meaning of any other enactment. He must be guided by the rules of grammar, by his knowledge of the common law, by the light (occasionally) thrown on American legislation by American history, and the conclusions to be derived from a careful study of judicial decisions. The task, in short, which lay before the great American commentators, was *the explanation of a definite legal document in accordance with the received canons of legal interpretation*. Their work, difficult as it might prove, was

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work of the kind to which lawyers are accustomed, and could be achieved by the use of ordinary legal methods." None of us will dispute the weight of these words. Justly applied as they are to the work of a Story or a Kent, they are no less striking in their application to the even greater labours of a Marshall.

I agree that the judgment on this special case must be for the Commonwealth, and with costs.

O'CONNOR, J. The judgments delivered, in which I entirely concur, have dealt so fully with the various contentions raised in the argument that I do not think it necessary to add anything except in reference to sec. 114 of the Constitution, upon the true interpretation of which the whole case in my opinion turns. The question for our determination may be very shortly stated.

Upon the establishment of the Commonwealth the Customs Houses in New South Wales as in other States became vested in the Commonwealth. Subsequently the Posts and Telegraph Department and the Department of Defence became transferred by proclamation under sec. 69 of the Constitution, and thereupon the lands and buildings used in connection with these departments became vested in the Commonwealth under sec. 85 of the Constitution.

Before the establishment of the Commonwealth such of these lands and buildings as were within the boundaries of the City of Sydney were liable to be rated, and were rated by the Municipal Council of Sydney under sec. 103 of the *Sydney Corporation Act* of 1879, and sec. 110 of the *Sydney Corporation Act* of 1902, which repealed that Act and took its place.

It was contended by the plaintiffs that, notwithstanding the establishment of the Commonwealth, and the vesting of these lands and buildings in the Commonwealth, the liability to be rated and to pay rates to the Municipal Council continued as before. The defendant on the other hand contended that, when the lands and buildings were vested in the Commonwealth, the liability to be rated by the Sydney Municipal Council came to an end. The question now submitted for our determination is, which contention is correct?

The defendants' case rests mainly upon sec. 114 of the Consti-

tution, which they ask the Court to interpret broadly as a direct prohibition against the levying of any tax or rate upon Commonwealth property by a State, or by any authority constituted or authorized by the Statutes of a State. The plaintiff, on the other hand, urges that a much more restricted interpretation should be placed upon the section, that the prohibition is only against any action of the State itself or the Parliament of the State, in imposing taxation for the purposes of Government. The section may in strictness bear either interpretation, if we look merely at the words. But to get at the real meaning we must go beyond that, we must examine the context, consider the Constitution as a whole, and its underlying principles and any circumstances which may throw light upon the object which the Convention had in view, when they embodied it in the Constitution. This is a sound rule in the interpretation of Statutes, and is well explained by *Lord Blackburn* in the *River Wear Commissioners* v. *Adamson*, 2 App. Cas., at p. 763, as follows :—" In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring further and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they are used." Before examining the words of the section, it will be useful to advert to the circumstances which the Convention had in view in framing this section, and their purpose and object in relation to those circumstances.

From the very nature of the Constitution, and the relation of States and Commonwealth, in the distribution of powers, it became necessary to provide that the sovereignty of each within its sphere should be absolute, and that no conflict of authority within the same sphere should be possible. The principles laid down by *Marshall*, C.J., in his historic judgment in *McCulloch* v. *Maryland* (4 Wheat., (U.S.), p. 316), are as applicable to the Australian Commonwealth Constitution as to the United States Constitution, and it must be taken that those principles and the controversies which had arisen in the United States in reference to their appli-

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cation, were within the knowledge of the Convention. In laying down these principles the Courts of the United States, in the absence of express provision, rested their reasoning upon the underlying principles of the Constitution, and on what was necessarily involved in the grant of sovereign powers. What could be more natural than that the Convention should, while it had the opportunity, place the application of these principles to the property of the Commonwealth, at all events, as far as possible, beyond controversy by embodying them directly in the face of the Constitution.

The material words of the section are as follows:—"A State shall not without the consent of the Parliament of the Commonwealth . . . impose any tax on property of any kind belonging to the Commonwealth. . ."

It has been urged that, because the prohibition is against a State, and the word "tax" only is used, the section cannot apply to a rate levied by a municipality. The section would, indeed, fall short of its object if it prohibited only taxation directly imposed by a State Act of Parliament, and left Commonwealth property open to taxation by a municipality, or any other agency which the State Parliament might choose to invest with powers of taxation. But no such restricted interpretation is necessary or reasonable. The State, being the repository of the whole executive and legislative powers of the community, may create subordinate bodies, such as municipalities, hand over to them the care of local interest, and give them such powers of raising money by rates or taxes as may be necessary for the proper care of these interests. But in all such cases these powers are exercised by the subordinate body as agent of the power that created it. *Field*, J., in his judgment in *Meriwether* v. *Garrett*, 102, U.S.R., at p. 511, says:—"Municipal corporations are mere instrumentalities of the State for the more convenient administration of local government. Their powers are such as the legislature may confer, and these may be enlarged, abridged, or entirely withdrawn, at its pleasure. This is common learning found in all adjudications on the subject of municipal bodies, and repeated by text writers."

The prohibition against the State imposing taxation on Commonwealth property is the most comprehensive form of prohibition

that can be used, and, if we are to have regard to the circumstances within the knowledge of the Convention, and the evident object and purpose of the section to which I have referred, it must be taken that the prohibition extends not only to taxation by a State for the purposes of general government, but also to taxation by an agency under the authority of the State, and deriving its power to levy taxation from the Parliament of the State. To hold otherwise would be to declare that the State might do indirectly what it cannot do directly. It seems to be clear, therefore, that a State has no more right to give legislative authority to a municipality to impose the tax, than it has to impose the tax itself, and that any provision in a State Act purporting to give such authority would be null and void. But it is urged on the part of the plaintiff that the section is prospective in its operation, and that it does nothing more than prohibit the passing of legislation by the State authorizing either State authority or municipal authority to levy the tax, and that a portion of the rates claimed were levied under the *Sydney Corporation Act* of 1879, a Statute which was in operation at the establishment of the Commonwealth, and which, it is contended, is kept alive by the operation of sec. 108 of the Constitution.

It is true that the section has only a prospective application, that is to say, it prohibits the imposing of any tax after the establishment of the Commonwealth, but I cannot assent to the restricted interpretation which it is sought to place on the word "impose." "Impose," no doubt, includes the giving of legislative authority to levy the tax, but it includes more, it includes the executive act of levying or collecting the tax. Its dictionary meaning is "to levy or exact as by authority." Having regard to the scope and purport of the section, effect must be given to that plain grammatical meaning of the word. It is unnecessary for me, in this aspect of the case, to consider whether the Act under which the tax is sought to be levied has, or has not, been kept alive by sec. 108. Existing Statutes are mentioned under that section, subject to the Constitution, and, in my view, sec. 114 expressly prohibits the imposing, that is to say, levying, exacting or collecting of the tax after the establishment of the Commonwealth. The section can be made fully effective, having regard

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to its scope and purpose, as already explained, only by giving a broad and reasonable interpretation to its language, including in the expression "State," all the agencies and instrumentalities by which a State can exercise its power of taxation, including in the word "impose" both meanings already alluded to, according as the thing to be prohibited is the legislative authority or the administrative Act, and giving to the word "tax" its ordinary grammatical meaning, which is wide enough to cover the general rates of a municipality. So interpreting the section, I am of opinion that the Constitution prohibits the levying of these rates, and that the Commonwealth is not liable in respect of the claim of the Municipal Council of Sydney.

Judgment for defendants.

Want, K.C., moved for a certificate under sec. 74 of the Constitution, with a view to an appeal to His Majesty in Council.

Per Curiam.—Before granting a certificate we must be satisfied that there is some special reason for certifying that the question is one "which ought to be determined by His Majesty in Council." It must, at least, appear that there is some reasonable ground for disputing the correctness of our judgment. This is a very plain case, depending on the construction of the plain unambiguous words of sec. 114. We do not see any ground for saying that it ought to be determined by His Majesty in Council.

Certificate refused.

Solicitors, for the plaintiffs, *Waldron, Dawson & Glover.*
Solicitors, for the defendant, *The Crown Solicitor.*