Solicitor, for the appellant, *N. W. Montagu.*

Solicitor, for the respondent, *The Crown Solicitor of New South Wales.*

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LOW v. BONARIUS.

Appl Kirmani v Captain Cook Cruises Pty Ltd & Ors 159 CLR 461

Appl Western Australia v Hamersley Iron Pty Ltd (No2) (1969) 120 CLR 74

Ovrr Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129

Discd West v Deputy Commissioner of Taxation (NSW) (1937) 56 CLR 657

Disap Webb v Outtrim (1906) 4 CLR 356

Foll Baxter v Comrs of Taxation (NSW) (1907) 4 CLR 1087

[HIGH COURT OF AUSTRALIA.]

ALFRED DEAKIN . . . . . APPELLANT;

AND

THOMAS PROUT WEBB (COMMISSIONER OF TAXES) . . . . . RESPONDENT.

SIR WILLIAM LYNE . . . . . APPELLANT;

AND

THOMAS PROUT WEBB (COMMISSIONER OF TAXES) . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Aug.* 16, 17, 18, 19, 22. *Oct.* 28. *Nov.* 3.

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

Legislative power of State—Limits inter se of Constitutional powers of Commonwealth and State—Control of Commonwealth Agency—Income Tax — Taxation of Income of Commonwealth Officer—Income taxed after receipt—Appeal to Privy Council—Application for Certificate—"Special reasons"—The Constitution, secs. 52 (*ii.*), 74, 106-109—*Income Tax Act* 1895 (*Victoria*) (*No.* 1374), *secs.* 2, 7, 9, 14; *Income Tax Act* 1901 (*Victoria*) (*No.* 1758).

The principle enunciated in *D'Emden* v. *Pedder* (*ante* p. 91, at p. 111), that "when a State attempts to give to its legislative or executive authority an operation which, if valid, would fetter, control, or interfere with, the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent invalid and inoperative," re-affirmed.

An Income Tax Act of a State, in so far as it attempts to tax the salaries of officers of the Commonwealth, is within the above principle.

Such an Act of a State is not taken out of the above principle by reason of the fact that the income tax is assessed on salary received during a preceding year.

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Held, therefore, that the salaries of a Minister of the Crown for the Commonwealth and of a member of the Commonwealth Parliament, so far as they are earned in Victoria, are not liable to assessment under the Income Tax Acts of Victoria.

Decision of the Full Court, 29 V.L.R., 748; 25 A.L.T., 245, reversed.

Wollaston's Case, 28 V.L.R., 357, over-ruled.

Bank of Toronto v. *Lambe*, 12 App. Cas., 575, distinguished.

The liability of a Commonwealth officer to an income tax imposed by a State Act in respect to his salary as such officer, is a question as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of a State within the meaning of sec. 74 of the Constitution, and, therefore, the decision of the High Court as to such liability is final and conclusive unless the Court certifies that the question is one which ought to be determined by His Majesty in Council.

The principles applicable to the granting by the Privy Council of leave to appeal from the High Court or from the Supreme Court of a State are not applicable to the granting of a certificate under sec. 74 of the Constitution.

No general rule can be laid down as to what are "special reasons" for granting such a certificate.

The following reasons *held* not sufficient reasons for granting a certificate: The desire of the governments of all or some of the States that an appeal to the Privy Council should be allowed; that the decision affects a large number of persons in many of the States and the revenues of those States; that the decision reverses a decision of the Supreme Court of a State.

APPEALS from the Supreme Court of Victoria.

Two cases were stated by the Commissioner of Taxes of Victoria pursuant to sec. 17 of the *Income Tax Act* 1896, the first of which was as follows:—

THE HONORABLE ALFRED DEAKIN'S CASE.

"1. The Honorable Alfred Deakin was from and after the 9th May, 1901, a member of the House of Representatives, and from and after the 1st January, 1901, one of the King's Ministers of State for the Commonwealth of Australia, and was, during the year 1901, domiciled and resident in Victoria.

"2. The said Alfred Deakin received under sec. 48 of the Constitution of the Commonwealth of Australia, an allowance of £233 for 1901 as a member of the House of Representatives, and for the same year received also as Minister of State £1,650, being

portion of the sum of £12,000 payable to the King for the salaries of the Ministers of State under sec. 66 of the Constitution.

"3. The electoral division in respect of which the said Alfred Deakin was a member of the House of Representatives was in the State of Victoria.

"4. The House of Representatives sat for the first time on the 19th day of May, 1901, on which day the said Alfred Deakin took his seat and the said House sat at all times hitherto in Victoria.

"5. The work done by the said Alfred Deakin as Minister and as a member as aforesaid, and in respect of which he received the moneys hereinbefore mentioned was so far as his personal action is concerned nearly all performed by him in and from Melbourne, although his responsibilities extended to all the Australian Commonwealth, and as Minister he attended His Excellency the Governor-General, and met his colleagues in Cabinet on eight occasions in Sydney and on sixty-eight occasions in Victoria and corresponded (principally from Melbourne) with federal officials in the several States of the Commonwealth with regard to Customs prosecutions and other matters.

"6. The said moneys were paid to and received by the said Alfred Deakin in Melbourne by payment of the said moneys into his account at the Union Bank of Australia, Melbourne.

"7. In assessing the income of the said Alfred Deakin for the purpose of income tax I included the said sums of £233 and £1,650. The taxpayer objected to such assessment on the ground that the said sums should not have been included.

"The question for the opinion of the Court is:—

"Were the said sums of £233 and £1,650 or was either and which of them or any and what portion thereof rightly included in the said assessment?"

SIR WILLIAM JOHN LYNE'S CASE.

The case set out in relation to Sir William John Lyne, a similar state of facts to those in the Honorable Alfred Deakin's case, the only material differences being that he was domiciled in New South Wales; that during the session of Parliament he generally came to Melbourne on Tuesday and left again for Sydney on Friday evening; that during adjournments of the House he

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generally remained in Sydney; that during the sitting of the House he occasionally remained in Melbourne from Friday to Tuesday; that he performed his work as Minister and as member chiefly in and from Melbourne, in Parliament House, and in rooms provided for ministers in premises rented by the Commonwealth; that he attended Cabinet meetings on twelve occasions in Sydney, and on more occasions in Melbourne; that when in Sydney he did his business there in premises rented by the Commonwealth; and that the moneys sought to be taxed were paid to and received by him in Sydney, by payment of them into his account at the Bank of New South Wales.

The Full Court (*Madden*, C.J., and *a'Beckett* and *Hodges*, JJ.), held that both the taxpayers were liable to income tax in respect of that portion of the sums in question which had been earned in Victoria, and the judgment of the Court is reported 29 V.L.R., 748; 25 A.L.T., 245.

From this decision the taxpayers now appealed.

Higgins, K.C. (Attorney-General for the Commonwealth), and *Drake*, for the appellants. As to the effect of the Income Tax Acts, there is no machinery in the Acts for distinguishing between parts of the salary of an individual where his whole salary is earned partly in and partly out of Victoria, although by sec. 10 of the *Income Tax Act* 1895 there is a specific provision for apportioning the profits of a foreign company. The ordinary principle that a tax is not to be levied unless by the literal construction of the Act it is granted must be applied. According to the *Income Tax Act* 1895 the only salary taxed is a salary earned in Victoria. If a subject cannot be brought within the letter of the law he is free; *Partington* v. *Attorney-General*, L.R. 4 H.L., 100, at p. 122, followed in *The Queen* v. *Buckley's Swamp Estate Co.*, 18 V.L.R., 66. A liberal construction in favour of the taxpayer must be given to taxing Acts; *Armytage* v. *Wilkinson*, 3 App. Cas., 355, at p. 369. This salary was not earned in Victoria, but was earned in Australia. It is true the boundaries of the Commonwealth are coincident with those of the States, but they are coincident on different planes. As to the meaning of income "earned derived or received" in sec. 14 (3) see *In re Income Tax*

Acts, 23 V.L.R., 312, at p. 316, and *In re Income Tax Acts*, 4 A.L.R. (C.N.), 37. Assuming that these incomes would be otherwise taxable, the tax is unlawful as it interferes directly between an officer of the Commonwealth and his Government. It is a tax imposed on an income when earned. Before it gets into the hands of the officer it is taxable. The Full Court has taken the view that income earned as well as income received must be included in returns of income under sec. 14 (3). Unless it is shown that this income was earned in Victoria, the Commissioner cannot recover anything. The whole salary must have been earned in Victoria in order to be taxable. The judgment of the Court in this case (29 V.L.R., 748; 25 A.L.T., 245) follows a previous decision of the Full Court in *Wollaston's Case*, 28 V.L.R., 357; 24 A.L.T., 63. If it is once admitted that there is any unconstitutionality in the taxing of a federal officer, the whole case for the Commissioner is gone. The Full Court relies on the power of the Crown to disallow an Act of a State to distinguish the decisions of the Courts of the United States of America. It is a most dangerous thing to put the Crown in the position of the power that is to judge in a conflict of legislation between the States and the Commonwealth. The Supreme Court drew a distinction between the power to refuse assent and the power to disallow.

[GRIFFITH, C.J.—We can see no distinction between the power of disallowance and the power of veto.]

[BARTON, J.—In the case of Canada the power of veto is different from that in the case of the Australian States, because in the former case the Governor-General in exercising the power acts on the advice of his ministers. It was never intended that this Court should hold its hand until it was known whether the Crown would exercise its power of disallowance.]

By sec. 48 of the Constitution the sum paid to members of Parliament is termed an "allowance." The salaries of the Ministers of the Crown are provided for by sec. 66 in the form of an appropriation to the Crown. It may be that this would come under the exemption from taxation contained in sec. 7 of the *Income Tax Act* 1895, of all income received by His Majesty. In *Wollaston's Case*, 28 V.L.R., 357, at p. 393, *a'Beckett*, J., was influenced by the fact that in that particular case there was no

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serious infringement on the immunity of federal instrumentalities. The point is that if there is a power innocently to infringe on that immunity there is power to noxiously do so. The only safe line of demarcation to draw is to treat federal instrumentalities upon one plane and State instrumentalities upon another. If *Wollaston's Case* is rightly decided there is no limit to the power of taxation. The imposition of the income tax for the year 1902 is authorized by Act No. 1758, which was passed after the Constitution, so that the question whether the tax is or is not validated by sec. 108 of the Constitution does not arise. Every presumption should be made against the application of the general words of the *Income Tax Act* 1895 to a class of officers of the Crown which was not then in existence. This Court has in *D'Emden* v. *Pedder*, *ante* p. 91, held that the decisions of the United States Courts based on that in *McCulloch* v. *Maryland*, 4 Wheat., 316, are applicable to the Constitution. In *Dobbins* v. *Erie County*, 16 Peters, 435, it was held that it is not competent for a State to tax the salary of a federal officer. In *Collector* v. *Day*, 11 Wall., 113, the same doctrine was applied to a Federal tax on the salary of a State Judge. The question of whether the limits of the Constitution have been transcended rests with this Court and with no other authority. Without dissent the principle has been established, affirmed and reaffirmed, that it is not competent for one government to tax another. Taxing the income of a federal officer is an interference with a federal instrumentality; *Dobbins* v. *Erie County* (*supra*). Whatever device is adopted, if the object is to diminish the amount payable to the officer, the device fails. It may be argued that the prohibition in sec. 114 of the Constitution against a State taxing the property of the Commonwealth, is limited to property and does not extend to Commonwealth instrumentalities, but the Court should not give as much weight to the *expressio unius exclusio alterius* argument in relation to the Constitution as in relation to ordinary Acts of Parliament; *Legal Tender Cases*, 12 Wall., 457, at 544. See also *Leprohon* v. *City of Ottawa*, 2 Ontario App., 522. There is a certain similarity between a federal officer doing his work in a State, and an ambassador. He is there not by the permission of the State but by virtue of a higher authority.

[GRIFFITH, C.J.—Is not the right to tax co-extensive only with the right to exclude? A State could not exclude a federal officer from its territory.]

As to the right to tax federal officers, see also *Ex parte Owen*, 20 New Brunswick R., 487; *R.* v. *Bowell*, 4 British Columbia R., 498. As to the *Bank of Toronto* v. *Lambe*, 12 App. Cas., 575, on which the Full Court relied so strongly, that was not a case of taxation of a federal instrumentality. The bank was a private bank, though incorporated under federal law. As in the *Municipal Council of Sydney* v. *The Commonwealth*, *ante* p. 208, it was held that a new kind of property had come into existence which was not in the contemplation of the Parliament of New South Wales when passing the *Sydney Corporation Act* 1902, so here a new kind of person, viz., an officer of the Commonwealth, has come into existence, who was not in the contemplation of the Victorian Parliament when the *Income Tax Act* 1895 was passed, and, therefore, he is not taxable under that Act. Whether this tax is levied under the Act of 1895 or that of 1902 it is subject to the Constitution. The Constitution was interpreted by this Court in *D'Emden* v. *Pedder*, *ante* p. 91, just as any other Imperial Act would be interpreted. The cases of *Dobbins* v. *Erie County*, *supra*, at p. 443; *Collector* v. *Day*, *supra*; and *Leprohon* v. *Ottawa*, *supra*, at p. 525, and 40 Ontario Rep., Q.B., 478, were all expressed to be test cases, and the decisions were intended to apply to all federal officers. The grant by the Constitution of express powers includes, by implication, the grant of powers without which the express powers would be useless. *Ex parte Owen*, *supra*, at p. 497. The income of a federal officer is itself a federal instrumentality, because it is the means by which the Commonwealth secures the services of the officer. The imposition of this tax is inconsistent with the Constitution in so far as it affects the remuneration of a minister, and of a member of parliament. The case for a member of parliament is much stronger than that for a minister, because of the language of sec. 48 of the Constitution. The tax, so far as it affects a minister, is an interference with the control of a department of the Commonwealth. Neither ministers nor members of parliament are within the jurisdiction of a State.

They also referred to *National Bank* v. *Commonwealth*, 9 Wall., 353, at p. 361.

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Isaacs, K.C., and *Cussen* (*Bryant* with them), for the respondent. The Income Tax Acts impose a tax on income, *i.e.*, on money that has come in. The original Act of 1895 is a constitutional Act. The only question now is, is each of the appellants now subject to the Act? The Act of 1895, being a valid Act, even if it is correct that it embraces various classes of income, viz., income earned, income derived, and income received, the appellants have, according to the special case, received the income, and it is in respect of the income they have received that they are taxed. The money had been paid to the bankers of the appellants, and was a debt owing by those bankers to the appellants. Further, the money had been received in the year prior to that in respect of which the tax is imposed. That tax is upon the appellants, and is proportioned to the amount of income they received in the particular year, which income is estimated by the amount of income received during the preceding year. If one of the appellants had ceased to hold office at the end of 1901, could he exclude from his return of income made for the year 1902 the salary he received during 1901? The Income Tax Acts do not make it unlawful for the officer to receive the whole of his salary. In that case there would be a conflict of powers. The whole question is what has the State Legislature done, and it is no use to say that it could do something illegal. There is a presumption that every Act is constitutional.

[GRIFFITH, C.J.—In our opinion there is no doubt that the tax imposed by those Acts is a tax on incomes received, and that the appellants had received the income when the tax was imposed.]

As to the meaning of income, see *Lawless* v. *Sullivan*, 6 App. Cas., 373. Apart from the federal aspect of the question, a salary is divisible, and may be apportioned, *e.g.*, in the case of a commercial traveller who travels outside as well as inside Victoria for the purpose of earning his salary. So far as it is earned in Victoria, it is taxable.

[GRIFFITH, C.J.—It is not necessary to decide that.]

As to the argument that a federal salary cannot be earned in Victoria, there is no Australian plane as distinct from a State plane. Prior to federation each State had plenary powers of legislation within its boundaries. The effect of federation was to collect certain subject matters and hand them over, not to another

territory, but to another authority, but the powers of that authority are to be exercised within the same territory for the same States. The States themselves, with their constitutions, and legislative and executive powers, remain exactly the same. The territory of each is the same. It is a transference of existing powers and creation of new powers in the same territory. When anything is described as happening, or being done, within a State, the same meaning must be given now as before federation.

[O'CONNOR, J.—So far as the carrying out of federal functions is concerned it may be that there are no State boundaries.]

GRIFFITH, C.J.—Or. XXX., r. 1, of the Rules under the *High Court Procedure Act* 1903, requires actions to be tried in the State in which the cause of action arose.]

That is where a material part of the cause of action arose ; *Read* v. *Brown*, 22 Q.B.D., 128. The word "income" in the Income Tax Acts must be read as "income so far as it arises in Victoria." Australia is only a geographical term. The income in question here was earned in Australia, and in that part of it called Victoria. In *United States* v. *Kagama*, 118 U.S.R., 375, which dealt with the right of a State to affect Indians in the Indian Territory, the Court looked at the geographical limits of the State, and held that the soil and people of the Territory were for some purposes under the jurisdiction of the State, and for other purposes under that of the Union. See also *Klaplin* v. *Hausman*, 93 U.S.R., at p. 136 ; *Tarble's Case*, 13 Wall., 397, at p. 406. "Earned within Victoria," means earned within the geographical limits of Victoria. As to the place where a crime is committed, see *R.* v. *Bamford*, (1901) 1 S.R., (N.S.W.), 337 ; *R.* v. *Coombes*, 1 Leach C.C., 388 ; *R.* v. *Keyn*, 2 Ex. D., 63, at p. 232. A federal officer working within the Commonwealth must earn his income within a State, and within that State in which he does the work. Could a mail contractor refuse to pay a State income tax as not being earned within the State ? If one of the appellants had died the day after his salary was paid would not the amount of it have been liable to probate duty ? All the United States cases regard the geographical limits of the State, and recognise that within those limits there are two authorities having different spheres of action. In the case of an Imperial officer sent to Australia to do work

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there, he earns his salary in Australia and in that particular part of it in which he does his work. His salary is fixed by a paramount power. Could he say he was on a different plane from an ordinary citizen and refuse to pay income tax whether imposed by the State or by the Commonwealth?

[GRIFFITH, C.J.—Although the British Parliament is paramount the British Government does not exercise its administrative powers here. For all practical purposes Great Britain is an entirely different State from Australia. But the Commonwealth has power over the whole of Australia and continuously exercises it.]

The power of the Imperial Parliament is the important thing. The non-user of that power is unimportant for this argument. That illustration is stronger than the present case. The State can be in no worse position in regard to the Commonwealth than that in which the Commonwealth is in regard to the Empire. This illustration bears upon the questions of the divisibility of the salary, of the meaning of "earned in Victoria," and of federal instrumentalities. If the State is prohibited from taxing a federal instrumentality the Commonwealth and the State are both equally prohibited from taxing the income when received of an Imperial instrumentality. Neither the Commonwealth nor the State can prevent the Imperial officer from coming here, or from receiving the whole of his salary, but both can tax the income of that officer when he receives it. In the latter case no conflict of power can arise, because the tax does not arise until after the transaction between the officer and his government is at an end.

[GRIFFITH, C.J.—Is not this case within the decision in *Dobbins* v. *Erie County* (*supra*)?]

No. The Act under consideration in that case taxed the emoluments of the office, *eo nomine*. The Court may well have thought that the tax had the effect of preventing the officer from receiving the whole of his salary. The Victorian income tax is an entirely personal tax; *In re Income Tax Acts*, 25 V.L.R., 554; 21 A.L.T., 206; *ib.*, 28 V.L.R., 338; 24 A.L.T., 55; *ib.*, 29 V.L.R., 525, at p. 530; 25 A.L.T., 136. Money when paid over is in the same position as land, and may be taxed; *Weston* v. *Charleston*, 2 Peters, 449, at p. 468. Every person in the State is taxable by the State in respect of money that is his. An employé of the

Commonwealth is in the same position for this purpose as a contractor with the Commonwealth.

[GRIFFITH, C.J.—There is this distinction, that a contractor can take the tax into consideration when making his contract.]

The case of *Thompson* v. *Union Pacific Railroad Co.*, 9 Wall., 579, at p. 590, shows how far *McCulloch* v. *Maryland* (*supra*) establishes a principle, and the Court refused to extend that principle. The Court also said that the principle was not so wide as some of the reasoning seemed to indicate. If the principle is as wide as is contended for it must cover the case of a contractor.

[GRIFFITH, C.J.—Not necessarily so. The case of the contractor was not necessarily within the contemplation of the legislature.]

The Courts of the United States have held that once money has become the property of a federal instrumentality it is taxable; *Easton* v. *Iowa*, 188 U.S.R., 220, at p. 230; *Murray* v. *Charleston*, 96 U.S.R., 432, at p. 446; *Snyder* v. *Bettman*, 190 U.S.R., 249; *United States* v. *Perkins*, 163 U.S.R., 625; *Home Insurance Co.* v. *New York*, 119 U.S.R., 129; *Western Union Telegraph Co.* v. *Massachusetts*, 125 U.S.R., 530.

[GRIFFITH, C.J.—All those cases illustrate the distinction I have before pointed out, viz., that if the tax is upon a person or corporation as a federal instrumentality, it is bad; if otherwise, it is good.]

The case of *Bank of Toronto* v. *Lambe*, 12 App. Cas., 575, is a distinct decision that the principle laid down in *McCulloch* v. *Maryland* (*supra*) has no application to a constitution granted by the British Parliament.

[GRIFFITH, C.J.—That case would have been decided in the same way in the United States apart altogether from the *British North America Act*.]

The Act under which the Bank of Toronto was constituted, 49 Vict. Ch. 120, puts no public duty on the bank to perform any federal function. That is the same in the case of the National Banks in the United States. See *Brightley's Digest of United States Laws*, p. 56; Act of June 3rd, 1864. The later American cases say that the same principles apply to the National Banks as to the bank referred to in *McCulloch* v. *Maryland* (*supra*).

[GRIFFITH, C.J.—Sec. 42 of the United States Act expressly

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provides that shares of the National Banks may be taxed by the States.]

Van Allen v. *Assessors*, 3 Wall., 573, at p. 596, shows that that provision only adopts the exception made by *Marshall*, C.J. The section does not alter the position. In *Bank of Toronto* v. *Lambe* (*supra*), at p. 578, it was said that the maxim that the power to tax is the power to destroy, which is the foundation of the principle laid down by *Marshall*, C.J., has no application to a constitution under the Crown. The Australian Constitution is exactly within the words of the judgment in that case; it is an exhaustive distribution of powers between the Commonwealth and the States. The only difference between the Australian and the Canadian Constitutions is that in the former the powers of the State are not enumerated.

[GRIFFITH, C.J.—Is the Admiral of the Australian Station taxable by the Commonwealth, or by the States?]

Yes, unless the taxing Act is repugnant to an Imperial Statute. The Commonwealth has power of direct taxation, and a State officer would be subject to a Commonwealth Income Tax Act. The Constitution must be dealt with in the same way as any other Imperial Act of Parliament. No prohibitions are to be implied in it. Victoria had, under her Constitution, express power, though in general words, to impose any taxation she thought fit. Of course, the power of the State Parliament does not extend now to matters as to which exclusive jurisdiction is given to the Commonwealth. The exclusive jurisdiction given by sec. 52 (ii.) of the Constitution is sufficient to support the decision in *D'Emden* v. *Pedder* (*supra*). Except as to the matters exclusively vested in the Commonwealth, the State Parliaments have the same powers as before federation.

[O'CONNOR, J.—Exclusive power is expressly given to the Commonwealth Parliament only as to the transferred departments, and nothing is said as to new departments, *e.g.*, the Department of Home Affairs.]

That may be a *casus omissus*. The United States Constitution is a grant by the people of the States. There is no power above them. The Australian Constitution is a grant and distribution of powers by the Imperial Parliament. The Constitutions of the States now depend on the Constitution of the Commonwealth.

Marshall, C.J., said that the powers of a State legislature, which are conferred by a single State, cannot over-ride the powers of the United States, which are given by the people of all the States. That cannot be said of the Australian States and the Commonwealth. The powers of the Australian States and of the Commonwealth come from the same source. All that this Court can look at in construing the Constitution is its legal aspect. The same distinction exists between the Australian Constitution and that of the United States as between the Canadian Constitution and that of the United States. It is a Constitution under the Crown. That of the United States is not under anything. The Constitutions of the United States and of the several States of the Union run absolutely on parallel lines, and there is nothing to control them but the law. So the Supreme Court of the United States had to find a principle which would preserve the existence of the Union. That Court, therefore, invented the doctrine of implied prohibition. That doctrine is no more applicable to the Australian Constitution than, according to the decision of the Privy Council, it is applicable to the Canadian Constitution. See also *R.* v. *Burah*, 3 App. Cas., 889, at p. 904. There are no restrictions on the powers of the States outside those contained in secs. 106 and 107 of the Constitution. There are no implied restrictions in that Constitution, but the Constitution of the United States is full of implied restrictions. As to the Canadian Constitution, see *per* Lord *Watson* in *Liquidator of Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, (1892) App. Cas., 437. The Canadian Provinces stand in the same relation to the Dominion as the Australian States do to the Commonwealth. As to the power of veto in Canada, see *Todd's Parliamentary Government in British Colonies*, 2nd ed., pp. 170, 527. The Crown had always at common law the right to revoke the assent given by its agent to a Colonial Act of Parliament. The fact that the Crown has said that that power may be exercised by the Governor-General in relation to Provincial Acts does not alter the position. Would the Privy Council have decided the *Bank of Toronto* v. *Lambe* (*supra*) differently if it had arisen under the Australian Constitution?

[GRIFFITH, C.J.—It was never intended that the veto should be

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used to settle disputes between the Commonwealth and the States. Sec. 74 of the Constitution expressly provides to the contrary.]

Many bills of the Dominion of Canada have not been assented to. See *Quick & Garran on the Constitution*, p. 694. The right of the Crown to disallow an Act must be regarded by this Court as an efficient power. The Crown would disallow an Act as between the Commonwealth and the States as it would in the case of a New Zealand Act which interferes with Canada. See also *Todd's Parliamentary Government in the Colonies*, p. 527. It has been held that if there is a power granted by the Constitution of a Province of Canada it does not matter if it conflicts with a power of the Dominion; *Attorney-General for Manitoba* v. *Manitoba Licence Holders' Association*, (1902) A.C., 73, at p. 78. Similarly a Dominion Act is not bad because it conflicts with the powers of a Province; *Russell* v. *The Queen*, 7 App. Cas., 829. In *Brewers' and Maltsters' Association of Ontario* v. *Attorney-General for Ontario* (1897), A.C., 231, at p. 237, it was said that if a provincial legislature were under the guise of direct taxation to seek to impose indirect taxation, the legislation might be invalid, but in this case there is no attempt under the guise of a State tax to cut down federal salaries or to affect federal operations. The effect may be the same *quâ* the man, but it is not the same *quâ* the Federal Government. There is no "direct impediment" placed in the way of the federal officer; see *Railroad Co.* v. *Peniston*, 18 Wall., 5, at p. 35. The taxation of a government agent is invalid only when it is the government that is attacked. *Central Pacific Railroad Co.* v. *California*, 162 U.S.R., 91, at p. 121. [They also referred to *Owensboro' National Bank* v. *Owensboro'*, 173 U.S.R., 664; *Davis* v. *Elmira Savings Bank*, 161 U.S.R., 283.] The true test, however, of the validity of a State Act is sec. 107 of the Constitution. The grant of the Constitutions of the Commonwealth and of the States is based on confidence that the powers will not be abused. [They also referred to *Loan Association* v. *Topeka*, 70 Wall., 655; *Lefroy's Legislative Power in Canada*, pp. xlxi., 198, 671; *Providence Bank* v. *Billings*, 4 Peters., 514, at p. 561; *Clements on Canadian Constitution*, pp. 174, 222; *Glossop* v. *Howard*, 10 Q.B., at p. 457; *R.* v. *Mayor of London*, 3 B. & A., 270.] In Canada the division of power is

on the same lines as in Australia, although the language used is different. This legislation is within sec. 108 of the Constitution. The mere fact that an Act passed subsequently to federation fixes the rate at which an income tax imposed by an Act prior to federation does not take the case out of sec. 108. Either under sec. 107 or 108 this tax is valid. The position in *McCulloch* v. *Maryland* (*supra*) has been misunderstood. It laid down one main principle that interference with federal operations by the State was not permissible, and further that taxation may be a form of interference. It was urged that the interference was a small one. *Marshall*, C.J., answered to that it may be very great and therefore there must be none at all. The result is that in such a case as the present there is a preliminary question for the Court:—Does the tax interfere with the agent as agent? The answer to it depends on the substance and effect of the Act. That was the question in *Brown* v. *Maryland*, 12 Wheat., 419; *Railroad Co.* v. *Peniston* (*supra*). In cases like *Dobbins* v. *Erie County* (*supra*) and *Leprohon* v. *City of Ottawa* (*supra*), the Courts have used the answer of *Marshall*, C.J., to the objection that the interference was a small one, as the ground for saying that there was an interference. They say the power may be abused, and therefore there is an interference. The question whether there is an interference is one of fact for the Court. The Australian Constitution protects the Commonwealth and the States in a way that the American Constitution does not protect the Union and the States. These officers are not picked out and taxed, but they are taxed in general with other citizens. In a general Act like these Income Tax Acts the Court should hold that it does not affect federal operations. None of the facts in the case show that the operations of the officers are interfered with. If a State Act were carried to excess or showed a discrimination, then the Imperial Government, that is the Crown, might interfere. From sec. 107 of the Constitution it is clear that it continues every power of the States Parliaments except those exclusively vested in the Commonwealth and therefore withdrawn from the States Parliaments. There are important powers referred to in the Constitution which the States never had. One of the powers that the State of Victoria originally had was the

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power to tax every person in Victoria. That power is not subject to any limitation. Sec. 107 was purposely left wider than the corresponding section in the United States Constitution in order that the States might exercise their powers during the transition period. The remedy is not to deny the existence of any power included in sec. 107, but it is under secs. 108 and 109 by the Parliament of the Commonwealth making laws. The Income Tax Acts would be protected by sec. 108 if by no other section. The Australian and the United States Constitutions have quite different histories. In the case of the former it has always been the custom for the people to trust parliament, while in the United States members of parliament have been looked on as mere delegates, and the powers of parliament were considered to be liable to abuse and therefore to be closely watched. In the Australian States we have responsible government, in America the legislative and executive parts of the government are distinctly separated. In Australia there is the protecting power of the Crown, in America there is no power above the Union, and the only protection for the Union and the States is the Supreme Court. In the circumstances of the Australian colonies it would not be astonishing to find unlimited power of taxation granted both to the Commonwealth and to the States, because it is assumed that the confidence will not be abused, and in addition there are the possibilities of suggestion by the governments, and of reserving Acts for the assent of the Crown, and the power of disallowance. In addition there is the power of this Court to say in particular cases that there is an interference with Commonwealth operations. As to the construction of the Income Tax Acts, if there is any doubt as to when the tax became operative, the Court will hold that it became operative at such a time as would make it constitutional, viz., when the taxpayer has received his salary.

Higgins, in reply. There is no line separating a tax which is discriminating from one which is not.

It is consistent with the facts stated in this case that the tax was payable before the appellants actually received the money. And whether the tax is payable before or after the receipt of it does not matter. The value of the office is depreciated by the tax.

The only Income Tax Act in force when the Constitution came into force was Act No. 1374. Assuming that it remained in force, this tax could not be claimed by force of that Act only, and, therefore, sec. 108 of the Constitution does not help. Further, Victoria never had the power to tax federal officers, and therefore the power to do so could not be continued. For the purpose of deciding as to a conflict of powers between the Commonwealth and a State the Crown is helpless. As to the argument that the power of the Commonwealth and of the States came from the same source, that of the Union and of the States came from the same source, viz., the people.

He referred to *National Bank* v. *Commonwealth*, 9 Wall., 353; *Davies* v. *Elmira Savings Bank* (*supra*); *Attorney-General for Ontario* v. *Attorney-General for Canada*, (1896) App. Cas., 348, at p. 366; *Snyder* v. *Bettman*, *supra*, at p. 254; *Tennant* v. *Smith*, (1892) App. Cas., 150.

Isaacs, K.C., referred to *Windsor* v. *Commercial Bank of Windsor*, 3 Cart., 367.

Cur. adv. vult.

October 28th.

GRIFFITH, C.J. These are two appeals from decisions of the Supreme Court of Victoria upon cases stated by the Commissioner of Taxes of that State, raising the question whether sums of money received by the appellants in respect of their remuneration for the year 1901 as Ministers of State of the Commonwealth and Members of the House of Representatives were properly included in the assessment of their income for that year for the purposes of determining the income tax payable in 1902 under the Victorian Income Tax Acts. The only difference between the two cases is that Sir W. Lyne represented a New South Wales constituency, and was domiciled in that State, in which he also resided, except so far as his official and parliamentary duties required his presence at the temporary seat of the Government at Melbourne, in Victoria, while Mr. Deakin represented a Victorian constituency, and was domiciled and resident in Victoria. The Supreme Court, following their previous decision in *Wollaston's Case* (28 V.L.R., 357), held that both sums were properly included in the assessment so far as they related to the earnings

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of the appellants in Victoria. The Court had held in *Wollaston's Case* that the salary of a Commonwealth officer whose duties require his presence in more than one State is apportionable in proportion to the periods spent within the several States.

The Victorian *Income Tax Act* 1895 (No. 1374), defines (sec. 2) the term "income derived by any person from personal exertion," or "income from personal exertion," as meaning "all income consisting of earnings, salaries, wages, allowances, pensions, superannuations, or retiring allowances or stipends earned in or derived from Victoria, and all income arising or accruing from any trade carried on in Victoria." The material words in the present case are "salaries . . . . earned in . . . . Victoria." Sec. 5 enacts that subject to the Act "there shall be charged levied collected and paid for the use of Her Majesty in aid of the Consolidated Revenue for each year duties of income tax at such rates as may for each year be declared by an Act of Parliament, that is to say—(*a*) On all incomes derived by any person from personal exertion a tax at such rates as shall be so declared." The tax is to be charged and paid upon "assessments" made under the Act. Sec. 8 enacts that every person shall be liable to tax "in respect of . . . income from personal exertion." For the purpose of making the assessments returns are required to be made annually by every taxpayer to the Commissioner of Taxes (sec. 14 (1)). These returns are to be "based upon the amount of income which was earned derived or received by the taxpayer during the year ending on the 31st of December immediately preceding the commencement of the year of assessment" (*ib.* (3)). The income tax payable in each year is, therefore, computed upon and payable in respect of the income received in the preceding year.

For the appellants it was contended that the income tax claimed from them was in substance a tax upon and diminution of their remuneration for their services performed as federal officers, and that an attempt by a State to tax or diminish federal remuneration is an interference with an agency or instrumentality of the Commonwealth, and is therefore obnoxious to the rule laid down by this Court in *D'Emden* v. *Pedder*, (*ante* p. 91, at p. 111): "When a State attempts to give to its legislative or executive

authority an operation which, if valid, would fetter, control, or interfere with the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent invalid and inoperative." It was also objected that, having regard to the nature of the remuneration in question, it could not be said to have been earned locally in Victoria, although the recipients were bodily present in that State during a portion of the year during which it was earned, but should be considered as having been earned in the Commonwealth regarded as a whole, and not in any special part of it. For the respondents it was contended that the tax, being payable in respect of the remuneration for a previous year which had been actually received by the taxpayer, was in substance a tax on realized property, and not a tax on the income. It was further argued that the doctrine laid down in *D'Emden* v. *Pedder* (*supra*) was inconsistent with the decision of the Judicial Committee in the case of *Bank of Toronto* v. *Lambe* (12 App. Cas., 575); and we were invited to follow the decision of the Judicial Committee in that case, and to review and, in effect, to depart from our decision in *D'Emden* v. *Pedder* (*supra*). It was also contended that, admitting the soundness of the rule as stated by this Court in *D'Emden* v. *Pedder* (*supra*), yet that rule, being based upon necessary implication, could not be extended beyond the necessity, and that its application to any particular case might be excluded by a contrary and controlling implication to be found in the Constitution. And it was said that, upon a consideration of the whole Constitution, it would be found that it was manifestly contemplated that the powers of the States to impose direct taxation should be left unimpaired as to all persons actually found within their boundaries.

In the Supreme Court (as reported in 29 V.L.R., 748) the learned *Chief Justice*, who delivered the judgment of the Court, after dealing with some arguments which were not pressed before us, based his judgment substantially upon *Wollaston's Case* (*supra*), which the Court thought quite consistent with the actual decision in *D'Emden* v. *Pedder* (*supra*).

In the "reasons" furnished to this Court, *a'Beckett*, J., thus states his grounds for concurring in the decision:—

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"1. That the case is not distinguishable from *Wollaston's Case* (28 V.L.R., 357), which binds our Court until shown to be erroneous by the judgment of a higher Court.

"2. I consider that the decision of the High Court in *D'Emden* v. *Pedder* (*supra*), was not based upon the reduction of the officer's income by the amount of the stamp, but on the requirement of a stamp being an interference with the conduct of federal business.

"3. My view of the effect of the American authorities appears at pp. 393, 394, 395 of 28 V.L.R., in which I state my reasons for thinking that our *Income Tax Act* does not offend against the rule laid down in *McCulloch* v. *State of Maryland* (4 Wheat., 316)."

Hodges, J., states that his reasons for concurring are that the case is not distinguishable from *Wollaston's Case* (*supra*). (The learned Judge was not a member of the Court which decided that case).

It will be convenient to deal first with the argument based upon *Bank of Toronto* v. *Lambe* (*supra*). After having had the advantage of a very full and able argument on the point, we adhere to all that we said in *D'Emden* v. *Pedder* (*supra*), as to the principles to be applied in interpreting the Australian Constitution, so far as regards the respective powers of the Commonwealth and the States. These principles are substantially the same as those laid down by Chief Justice *Marshall* in *McCulloch* v. *State of Maryland* (*supra*).

The learned Judges of the Supreme Court intimated that they did not consider themselves bound by the reasoning contained in the judgment of this Court in *D'Emden* v. *Pedder* (*supra*), although they agreed in the conclusion. They said that they preferred to follow the decisions of the Judicial Committee of the Privy Council upon the Constitution of Canada, suggesting that this Court had indicated a disposition to show a preference for the American over the English decisions. This is, we think, a somewhat novel mode of dealing with a judgment of a Court of final appeal. A Court of law performs the double function of declaring the law, and of applying it to the facts. When the legal principles which govern the case are in controversy, it is the practice of English Courts not to content themselves with a statement of their conclusion, but to express their reasons, which, in the case of Courts of

Appeal, are ordinarily accepted by other Courts upon whom the decision is binding, as an authoritative exposition of the law on the point under consideration. If the reasons may be disregarded and treated as mere *obiter dicta*, because, in the opinion of the Court, the same conclusion might have been reached by another road, the value of judgments as expositions of the law would be sensibly diminished. The learned Judges are, however, quite in error in supposing that we have, in any case that has yet come before us, indicated any preference for American decisions, or any disregard for British decisions. In *D'Emden* v. *Pedder* (*supra*), we pointed out, briefly, that the case of *Bank of Toronto* v. *Lambe* (*supra*) had no application to the matter then before us. In deference to the learned Judges who decided the present case, and to the elaborate argument for the respondent, we proceed to deal with the point again, and at some greater length.

The scheme of the Australian Constitution, like that of the Constitution of the United States, is to confer certain definite and specified powers upon the Commonwealth, and to leave the residue of power in the hands of the States. This is expressed in our Constitution by the language of secs. 51 and 52, which confer the federal power, and sec. 107, which provides that "Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth, or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth." In the American Constitution it is expressed in the words of the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people." In our judgment the schemes of these two Constitutions are, in this respect, identical. In neither case is any new power conferred upon the States, nor is there any exclusive distribution of powers, except as to a limited class of cases. It was suggested in argument that a distinction is to be found in the fact that in the United States the ultimate source of power is the people, *i.e.*, the collective people of the United States in the one case, and the people of the several States in the other, while in Australia the ultimate source is, in each case, the Crown or the Parliament of

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the United Kingdom. We are quite unable to see the relevancy of this distinction. It is a matter of common knowledge that the framers of the Australian Constitution were familiar with the two great examples of English speaking federations, and deliberately adopted, with regard to the distribution of powers, the model of the United States, in preference to that of the Canadian Dominion. They used language not verbally identical, but synonymous, for the purpose of defining that distribution. And the respective powers of the Commonwealth and the States having been defined and distributed by the ultimate sovereign power, it appears to be quite irrelevant to the question of interpretation whether that sovereign power is one or several, or whether it is the collective people or a personal monarch or a constitutional parliament. The scheme of the Canadian Constitution, which was rejected by the framers of this Constitution, is essentially different. An attempt was made in the *British North America Act*, by which the powers of the Dominion and the Provinces are conferred, to enumerate all possible subjects of legislation, and to distribute them between the Dominion and the Provinces, giving the power in each case to the one authority to the exclusion of the other. It follows that every power of legislation must reside in one authority or the other, and if it cannot be exercised by the authority on whom it is conferred in express terms, it cannot be exercised at all. Whether the doctrine of *McCulloch* v. *Maryland* (*supra*) is applicable to the exercise of an express power of legislation apparently conferred on a Province, but repugnant to the general scheme of the instrument (the *British North America Act*) from which the implied restriction is sought to be inferred, is a question which has not yet come before the Judicial Committee for decision, but in the Provincial Courts it has long been held that the doctrine is applicable to such a case (*Leprohon* v. *Ottawa*, 2 Ontario App. Cas., 522; *Ex parte Owen*, 20 New Br. R., 487; *R.* v. *Bowell*, 4 Brit. Col. R., 498.) In the later case of *Brewers and Maltsters Association of Ontario* v. *Attorney-General for Ontario*, 1897 A.C., 231, however, the Judicial Committee intimated that they would approach the consideration of such a question with an open mind.

The case of *Bank of Toronto* v. *Lambe* (*supra*) did not raise any

such question. Amongst the matters within the exclusive legislative power of the Dominion are "banking, incorporation of banks and the making of paper money;" and amongst the matters within the exclusive power of the Provinces is "direct taxation within the Province in order to the raising of a revenue for Provincial purposes" (sec. 92 (2)). The Bank of Toronto was a bank incorporated by Dominion law. The question was whether a tax imposed under a law of the Province of Quebec was within the power of the Provincial legislature. The Act in question, which was entitled "an Act to impose certain direct taxes on certain commercial corporations," enacted that "every bank carrying on the business of banking in this Province" and a number of other specified companies should annually pay the several taxes thereby imposed upon them. In the case of a bank the tax imposed varied with the paid-up capital, with an additional sum for each office or place of business. The question was whether the law imposing the tax was valid under the power to impose "direct taxation within the Province." It was objected that the tax was an indirect tax; that it was not imposed within the limits of the Province, inasmuch as, although the bank carried on part of its business in the Province of Quebec, its principal place of business was in the Province of Ontario, where its principal capital, which was the basis for estimating the tax, was kept; that the Provincial legislature could only tax that which exists by their authority or is introduced by their permission; and that if the power to tax such banks existed they might be crushed out of existence by it, and so the power of the Dominion Parliament to create them might be nullified. The case of *McCulloch* v. *Maryland* (*supra*), was cited, apparently in support of the two last stated objections. The Judicial Committee first addressed themselves to the question whether the tax was a direct tax within the meaning of the *British North America Act*, and came to the conclusion that it was. They next determined that the tax was taxation within the Province. Sec. 92 (2), they thought, did not require that the persons to be taxed should be domiciled or even resident within the Province. It was sufficient if the persons were found within the Province provided that they were taxed directly. The bank was found to be carrying on business there, and on that ground

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alone it was taxed. There was no attempt to tax the capital of the bank or its profits, but the legislature had adopted its own measure of taxation by reference to facts which could be verified without doubt or delay. Their Lordships then inquired whether there was anything in sec. 91, by which the legislative powers of the Dominion are defined, which would operate to restrict the meaning so assigned to sec. 92 (2), and found nothing. They thought that the power to make banks contribute to the public objects of the Provinces where they carry on business did not interfere at all with the power of making laws on the subject of banking or with the power of incorporating banks. But they said nothing to suggest that if there were such an interference the Provincial law would be valid. So far there is nothing in the opinion expressed by their Lordships to affect the doctrine of *McCulloch* v. *Maryland*. With regard to the objection that the power, if existent, might be used so as to crush a bank out of existence, and so nullify the power of the Dominion Parliament to create banks, they observed that people who are trusted with the great power of making laws for property and civil rights may well be trusted to levy taxes; and added that "whatever power falls within the meaning of classes 2 and 9 is, in their Lordships' judgment, what the Imperial Parliament intended to give; and to place a limit on it because the power may be used unwisely, as all powers may, would be an error, and would lead to insuperable difficulties in the construction of the Federation Act." The foundation of this argument is, obviously, the fact that the power in question was conferred by the express words of the Statute. It is, indeed, self-evident that when a power is conferred in express terms the possibility of its abuse affords no argument against its existence. But when an alleged power is not expressly conferred, but the question of the existence of the power or the limits of its exercise is a matter of inference and of implication depending upon a consideration of the whole of an instrument dealing with the relations of the several parts of a federated State, the possibility that the power, if existent or unlimited, might be exercised to the destruction or the impairment of the efficiency of the agencies of the general government, is very relevant in considering whether, upon the proper construction of the whole instrument,

it appears that the power was intended to be conferred, either absolutely or with limitations.

Their Lordships then dealt with the last objection, and with the arguments based on *McCulloch* v. *Maryland* (*supra*), and said (12 App. Cas., at p. 587):—"Their Lordships have been invited to take a very wide range on this part of the case, and to apply to the construction of the Federation Act the principles laid down for the United States by Chief Justice *Marshall*. Everyone would gladly accept the guidance of that great Judge in a parallel case. But he was dealing with the Constitution of the United States. Under that Constitution, as their Lordships understand, each State may make laws for itself, uncontrolled by the federal power, and subject only to the limits placed by law on the range of subjects within its jurisdiction. In such a Constitution Chief Justice *Marshall* found one of those limits at the point at which the action of the State legislature came into conflict with the power vested in Congress. The appellant invokes that principle to support the conclusion that the Federation Act must be so construed as to allow no power to the provincial legislatures under sec. 92, which may by possibility, and if exercised in some extravagant way, interfere with the objects of the Dominion in exercising their powers under sec. 91. It is quite impossible to argue from one case to the other. Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated Provinces a carefully balanced constitution, under which no one of the parts can pass laws for itself except under the control of the whole acting through the Governor-General. And the question they have to answer is whether the one body or the other has power to make a given law. If they find that on the due construction of the Act a legislative power falls within sec. 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which otherwise would be open to the Dominion Parliament."

We respectfully agree that, so far as regards the question then under consideration, it was quite impossible to argue from one

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case to the other. But it is equally impossible to argue from secs. 91 and 92 of the Dominion Constitution to the Constitution of the Australian Commonwealth. In the case of the *British North America Act* the function of the judiciary is "to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies," in one or the other of which, but never in both, every legislative power is vested. In the construction of such an Act, to deny the power to the legislature in which it is expressly and exclusively vested would be, as already said, to deny altogether the existence of the power. This, however, does not determine whether Chief Justice *Marshall's* doctrine is, or is not, applicable to an attempt by a Provincial legislature, under the form of direct taxation, or otherwise, to interfere with a Dominion agency or instrumentality. No such question arose in the bank case. The doctrine of *McCulloch* v. *Maryland* (*supra*) has never been extended in the United States so far as to cover such a case as the taxation of the Bank of Toronto, in the manner effected by the Quebec Act. Some confusion has arisen from a misconception of the reference in the judgment to the fact that under the Canadian Constitution "no one of the parts can pass laws for itself except under control of the whole acting through the Governor-General." It may, perhaps, be argued, when the time comes to argue it, that a Provincial law which interferes with the operations of the Dominion Government is not lightly to be held invalid merely for that reason, having regard to the fact that it has received the assent of that Government, which may, therefore, be said to have offered no objection to the interference; just as it was said that laws interfering with the royal prerogative were valid on the ground that the Crown, by assenting to them, waived the prerogative *pro tanto*. But, as already said, no such question arose in the case before their Lordships in the view which they took of the operation of the Quebec Statute. And no such question can arise under the Australian Constitution, under which the Commonwealth Government has no control over the laws of the States. There is no analogy between the control of the Dominion Government, acting through the Governor-General, over Provincial legislation, and the power of disallowance reserved

by the Australian State Constitutions to the Sovereign. The principles on which those powers are respectively exercised are essentially different. In the case of Canada the power is a power intended to be exercised by the Governor-General on the advice of the Dominion Ministers of State, having regard to the interests of the Dominion, while, in the case of the Australian States, it is familiar to all students of constitutional law that the power is exercised by the Sovereign on the advice of the Imperial Ministers as a trustee for the interests of the whole Empire. We are, therefore, of opinion that the case of *Bank of Toronto* v. *Lambe* (*supra*) has no bearing upon the question now under consideration, and that we are not showing any preference for American over English decisions when we decline to accept the decisions of the Judicial Committee on the construction of the *British North America Act* as necessarily applicable to the Australian Constitution. If, indeed, objection were taken to the power of a State legislature to impose taxation upon the property of a bank within the State, or to impose a licence fee upon a bank estimated upon the amount of its paid up capital or the number of its branches, on the ground that by the Australian Constitution the Parliament of the Commonwealth has power to make laws with respect to "banking other than State banking, the incorporation of banks, or the issue of paper money" (sec. 51 (xiii.)), *Bank of Toronto* v. *Lambe* (*supra*) would be very much in point, and we should hesitate a long time before declining to follow it. It is sufficient to say that that is not the present case.

We pass to the argument which seeks to establish that the tax now under consideration is not a tax on the income of the appellants, but a tax on realized property. In one sense income tax is undoubtedly a tax on property. In Italy, where it is said to have been invented, it is expressly known as the *Tassa sulla ricchezza mobile*. Indeed, all taxes except poll taxes and some licence fees, are taxes in respect of property, although payable by persons. But in considering grave constitutional questions involving the reciprocal powers and duties of States regard must be had to things and not to words, to substance and not to form. When a tax is imposed upon a person in respect of property, as, for instance, in the case of municipal taxation,

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the substance of the matter is that the tax is imposed upon the property. And the ordinary use of language follows this principle. We talk of land tax, income tax, customs duties on imports, excise duties on manufactures, succession duties. In each case the substance of the matter is the exaction of a fixed sum from the taxpayer, computed according to the value or quantity of the thing in respect of which the tax is payable. Nor can it make any difference in substance whether, in the case of an income tax, the tax is deducted "at the source"—to use a term applied under the English system—or collected from the taxpayer after the receipt of the income. In either case the effect, if any, of the imposition as a diminution of the net emoluments of the taxpayer is identical. The matter may be illustrated by considering a case in which the reduction of a salary is expressly prohibited. By the Constitution the salary of the Governor-General may not be altered during the continuance of office. If the Federal Parliament were to attempt to impose an income tax of, say, two shillings in the pound with respect to the Governor-General's salary, the result would be that the effective salary would be reduced by ten per cent. whether the tax were deducted before payment of the salary or demanded and collected afterwards. This is the accepted view in the United States (see Mr. Justice *Miller's Lectures on the Constitution of the United States*, pp. 247-8). This would be a case in which the payment and the deduction are made by the same hands. Or suppose the case of an employer who makes a levy upon his employés against their will, of a sum equal to a fixed percentage of their wages. Whether the levy is deducted from each payment, or is adjusted periodically as a matter of account, it would be in plain violation of a law which forbade any deduction from the salary. If, however, the levy is not made by the same Government that makes the payment, although it is not a diminution in exactly the same sense, the effect upon the recipient of the income is the same. His effective salary is diminished. The question in that case is whether the authority which makes the diminution has power to do so. If it has no such power, it cannot effect the same purpose by the use of another form of words. The corollary of the maxim *quando lex aliquid alicui concedit, concedit et id sine*

quo res ipsa esse non potest, on which this Court mainly based its judgment in *D'Emden* v. *Pedder* (*supra*), is *quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud.* When the law prohibits the doing of anything, the prohibition cannot be evaded by doing something which is substantially the same, merely by using a different form of words to describe it. For example, if the taxation of income were expressly prohibited by the Constitution of a State, a law which required every citizen to pay annually a sum of money equal to an aliquot part of his income, whether for that year or for a preceding year, would be manifestly invalid. For these reasons we think that the tax now under consideration is, in substance, if valid, both a tax upon the income of the appellants, and a diminution of that income.

The next question is whether such an imposition or diminution made by the authority of a State would, if valid, fetter, control, or interfere with the free exercise of the legislative or executive power of the Commonwealth (*D'Emden* v. *Pedder*, *ante* p. 91, at p. 111). The question so put appears to supply its own answer. On this point the case of *Dobbins* v. *Commissioners of Erie County* (16 Peters, 435), was referred to, and relied on for the appellants. That case was decided by the Supreme Court of the United States in 1842, and its authority has never since been doubted. It has been followed in Canada for more than 25 years, and the decisions adopting it, and following it, have never been appealed from, either to the Supreme Court of Canada or to the Privy Council. The question in that case was whether the salary of an officer of the United States was subject to taxation under a law of the State of Pennsylvania. The Supreme Court, after pointing out that the tax was in substance a tax on the emoluments of the office, said, in language exactly applicable to the Australian Constitution, (p. 446): "Taxation is a sacred right, essential to the existence of government—an incident of sovereignty. The right of legislation is co-extensive with the incident to attach it upon all persons and property within the jurisdiction of a State. But in our system there are limitations upon that right. There is a concurrent right of legislation in the States and in the United States, except as both are restrained by the Constitution of the United States. Both are restrained upon this subject by express prohibi-

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tions in the Constitution; and the States, by such as are necessarily implied, when the exercise of the right by a State conflicts with the perfect execution of another sovereign power delegated to the United States; that occurs when taxation by a State acts upon the instruments, emoluments, and persons which the United States may use and employ as necessary and proper means to execute their sovereign powers. The government of the United States is supreme within its sphere of action. The means necessary and proper to carry into effect the powers of the Constitution are in Congress. Taxation is a sovereign power of a State; but the collection of revenue by imposts upon imported goods, and the regulation of commerce, are also sovereign powers in the United States. Let us apply, then, the principles just stated, and the powers mentioned to the case in judgment, and see what will be the result." They then pointed out that an officer of the United States is a means for carrying out the ends of government, just as much as ships or guns, and proceeded (p. 448): "Is not compensation the means by which his services are procured and retained? It is true it becomes his when he has earned it. If it can be taxed by a State, as compensation, will not Congress have to graduate its amount with reference to its reduction by the tax? The execution of a national power, by way of compensation to officers, can in no way be subordinate to the action of the State legislatures upon the same subject. It would destroy also all uniformity of compensation for the same service, as the taxes by the States would be different. To allow such a right of taxation to be in the States would also, in effect, be to give the States a revenue out of the revenue of the United States, to which they are not constitutionally entitled, either directly or indirectly; neither by their own action, nor by that of Congress. The revenue of the United States is intended by the Constitution to pay the debts, and provide for the common defence and general welfare of the United States; to be expended, in particular, in carrying into effect the laws made to execute all the express powers, 'and all other powers vested by the Constitution in the Government of the United States.' But the unconstitutionality of such taxation by a State as that now before us may be safely put (though it is not the only ground) upon its interference with the constitutional

means which have been legislated by the Government of the United States, to carry into effect its powers to lay and collect taxes, duties, imposts, &c., and to regulate commerce." . . . . "But we have said that the ground upon which we have just put the unconstitutionality of the tax in the case before us, is not the sole ground upon which our conclusion can be maintained. We will now state another ground; and we do so, because it is applicable to exempt the salaries of all officers of the United States from taxation by the States. The powers of the national government can only be executed by officers whose services must be compensated by Congress. The allowance is in its discretion. The presumption is that the compensation given by it is no more than the services are worth, and only such in amount as will secure from the officer the diligent performance of his duties. The officers execute their offices for the public good. This implies their right of reaping from thence the recompense the services they may render may deserve; without that recompense being in any way lessened, except by the sovereign power from whom the officer derives his appointment, or by another sovereign power to whom the first has delegated the right of taxation over all the objects of taxation, in common with itself, for the benefit of both. And no diminution in the recompense of an officer is just and lawful, unless it be prospective, or by way of taxation by the sovereignty who has a power to impose it, and which is intended to bear equally upon all according to their estate. The compensation of an officer of the United States is fixed by a law made by Congress. It is in its exclusive discretion to determine what shall be given. It exercises the discretion and fixes the amount, and confers upon the officer the right to receive it when it has been earned. Does not a tax, then, by a State upon the office, diminishing the recompense, conflict with the law of the United States, which secures it to the officer in its entireness? It certainly has such an effect, and any law of a State imposing such a tax cannot be constitutional, because it conflicts with a law of Congress made in pursuance of the Constitution, and which makes it the supreme law of the land."

We are not, of course, bound by this case as an authority. But the reasoning of the judgment appears to us to be unanswerable,

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and we adopt it. Indeed the only attempt made to answer it was the contention that the principles applicable to the interpretation of the Constitution of the United States are not applicable to that of the Commonwealth, with which we have already dealt at sufficient length. The principles in either case are well known canons of legal interpretation applicable to the construction of written instruments.

In its application to the present cases the reasoning of the Supreme Court in *Dobbins's Case* (*supra*) derives additional weight from the circumstance, adverted to in the judgment of this Court in *D'Emden* v. *Pedder* (*supra*), that, the interpretation of the American Constitution as to this point having been long since settled by judicial decision, it is a reasonable inference that it was intended by the framers of the Australian Constitution, when adopting similar language, that like provisions should receive like interpretation.

In the case of the Commonwealth the argument from the destruction of uniformity of compensation has especial force when regard is had to the circumstances of Australia. The income taxes in the several States are unequal in their incidence. They may be of any amount which the State thinks fit to impose. In order, therefore, to give effect to the provisions of the federal laws regulating the salaries of officers according to their duties, classification, and length of service, it would be necessary to make special provision for adjusting their incomes when transferred from one State to another. State taxation of federal salaries is open then to two objections: (1) It in effect diminishes the recompense allotted by the Commonwealth to its officers, and so interferes with its agencies; and (2) It interferes with the freedom of action of the Commonwealth in the transfer of its officers from State to State, except at the risk of doing them an injustice by reducing their effective remuneration—an injustice only to be remedied by the appropriation of federal revenues for that purpose. Moreover, in the case of officers whose duties require their presence in different States at different times, their effective remuneration would, if the view of the Supreme Court in *Wollaston's Case* as to the apportionment of income is correct, depend in part upon the place to which from time to time their duties might call

them. Taxation of the remuneration of the members of the Federal legislature is open to the first objection only. If the view of the Supreme Court is accepted, the taxation of the salaries of Federal Ministers is open to both.

Is there, then, any express provision in the Constitution which authorizes such an interference? It was contended that sec. 107 of the Constitution is equivalent to an express re-enactment of the provisions of the State Constitutions, and operates expressly to confer upon the States *de novo* all the powers of legislation which they had as States not forming part of the Commonwealth, except those specially mentioned in the Constitution as withdrawn. This section does not purport to confer any new powers. What, then, were the existing powers of taxation possessed by the States? They included unlimited powers of taxation of all property within the limits of the States, and of all persons who come within the State by its permission. Such a power is an attribute of sovereignty, and extends to all persons to whom the sovereignty itself extends *quoad hoc*. But could such a power have been applied to a person who came within the State, not by the State's permission, but under the direction of a paramount sovereign power, and merely for the purpose of performing duties assigned to him by that paramount power? For instance, an admiral of the British fleet stationed in State waters for the whole or part of a year. An ordinary citizen has the choice of living, or refusing to live, within the State. If he elects to live there, he cannot refuse to obey the laws which prescribe the conditions of his residence. But, in the case of a person who is sent to live within a State by a paramount sovereignty without choice on his part, it is manifest that any law which imposes, as a condition of his residence, the obligation of contributing a portion of his official salary to the State revenue is an interference with the freedom of action of the paramount sovereignty. In practice, we know that such a power has never been asserted with respect to governors or admirals or officers of the Imperial fleet, and it has not been necessary to inquire into the legal foundation for the admitted exemption. We can find nothing in sec. 107, or any other provisions of the Constitution, to suggest the existence of such a power. If, however, the power of taxation under the State Constitution did, in point of law, extend to all persons

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whatever found within its boundaries, we think that the power, so far as its exercise would interfere with federal agencies, is a power withdrawn from the States by the Constitution within the meaning of sec. 107. We cannot accede to the argument that this withdrawal applies only to the matters specifically mentioned in the Constitution as being so withdrawn—a construction which, for the reasons already given, would deny to the Federal Government the freedom of action which the case of *D'Emden* v. *Pedder* (*supra*) declares it to possess.

Can it, then, be said to be a matter which must have been contemplated by the framers of the Constitution? The contrary inference is suggested, if not, indeed, compelled, by the consideration that, both under the Constitution of the United States, and that of Canada, which were considered by the framers, the power had always been denied. It is not material that the *Income Tax Act* (No. 1374), was passed before, while the Act fixing the rate of income tax for the year 1902 was passed after, the establishment of the Commonwealth. No doubt, when the language of an Act is general, it will be construed as extending to new forms of the same subject-matter afterwards coming into existence. But, for the reasons already given, we think that the *Income Tax Act* (No. 1374) cannot be construed as extending to federal incomes, and that the Act of 1901, if construed as extending to them, is, to that extent, invalid.

It is not necessary to express any opinion as to the argument that the income of the appellants was not earned in Victoria within the meaning of the *Income Tax Act* (No. 1374), or upon the question whether the salaries of federal officers, whose duties require their presence in several States during the same year, could, if they were taxable, be apportioned. But we are not to be understood as assenting to the view of the Supreme Court on either point.

The appeals must, therefore, be allowed, and the question in each case must be answered by declaring that no portion of either sum was rightly included in the assessment. The respondent must pay the costs in the Supreme Court, and of these appeals.

Appeals allowed with costs here and in the Supreme Court.

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On a subsequent day the respondent moved for a certificate under sec. 74 of the Constitution. The motion was supported by an affidavit of the respondent setting out (*inter alia*) that before the Court delivered judgment, in reply to letters of the Premier of Victoria, the Premiers of all the other States except Tasmania, stated that, if the decision of the High Court should be against the respondent, they would support the present application. On the hearing it was stated at the Bar that a telegram had been received from the Premier of Tasmania to the same effect.

Isaacs, K.C., and *Cussen* (*Bryant* with them), for the respondent. The words "special reason" in sec. 74 of the Constitution are very wide, and should be very elastic. The considerations which should influence the Court in granting a certificate are not merely of law but also of fact. The desire of the people of Australia is an important consideration. In this case the desire of the people of the various States that the Privy Council should deal with the matter, has been expressed through their Ministers, and that is the proper method of expressing that desire. The meaning of the section is that in the matters therein referred to the decision of this Court should be final. The Court, however, is an organ of the people, and if the people desire that a matter should have further consideration, the Court should take that desire into consideration, and should not lightly set it aside. As to the nature of the discretion in such cases as this see *In re Solomons*, (1904) 1 K.B., 106, *per Vaughan-Williams*, L.J., at p. 113. This Court is at large as to what it can do. The importance of the case should also be taken into consideration; *Clergue* v. *Murray*, (1903) A.C., 521. There must be a question of law of sufficient importance to justify an appeal; *Canadian Pacific Ry. Co.* v. *Blain*, (1904) A.C., 453. See also *McLaughlin* v. *Daily Telegraph Co.* (*ante*, p. 479). As to what is a special reason no rule can be laid down that is exhaustive. Some of the rules that govern one Court in granting or refusing leave to appeal from another Court do not apply with the same force where a Court is asked to grant leave to appeal from itself to another Court. See also *Annual Practice* 1904, p. 925; and *Quick and Groom's Judicial Power of the Commonwealth*, p. 399, as to "good cause," and *In re Friezer*, 27

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V.L.R., 335, at p. 343; 23 A.L.T., 67. This case is very important to the various States as it involves questions of revenue and general State control. It also affects a large number of persons. Another reason that the Court should consider is that there is a difference of opinion between this Court and the Supreme Court of the State. It is impossible to say the matter is beyond all argument. It is reasonably capable of argument to the contrary. In the view of the respondent there is a difference between the principles laid down in *Bank of Toronto* v. *Lambe* (*supra*), and those laid down in this case. There was no election by the respondent to come to this Court. If all questions of policy are excluded from consideration it is difficult to conceive any case in which more important questions of law or of fact can arise than have arisen in this case. The combination of all the reasons already stated will affect the Court in granting or refusing a certificate. All the elements that can possibly arise under this section arise here.

[GRIFFITH, C.J.—Can you suggest any case in which the Court should not grant a certificate?]

Yes. *D'Emden* v. *Pedder* (*ante* p. 91) affords an example. That was a clear case of interference by a State with a Commonwealth agency.

Higgins, K.C., and *Drake*, for the appellants. In the order granting the certificate the reasons should be stated. What special reason could be stated here? If the desire expressed by the State Premiers were given weight to, it would mean that more facilities for appeal to the Privy Council would be given to a State being a litigant than to a private litigant. The State Premiers do not represent the public. The wish of the public is expressed, finally, in the Constitution. The Court has laid down the principles upon which it will act in *Municipal Council of Sydney* v. *The Commonwealth*, (*ante* p. 242.) It would be a breach of trust if the Court were to say that, because a question was difficult, it would shunt the responsibility on to the Privy Council. The possibility of the decision affecting other parts of the British Empire may be a special reason, but that does not exist here. By the draft Constitution, approved of by the people, the granting a certificate was limited to matters affecting other parts of the Empire.

[GRIFFITH, C.J.—Suppose that we were satisfied that our decision was right, but thought that the Privy Council would decide otherwise if they had the opportunity, would that be a special reason ?]

No. None of the other reasons put forward are "special reasons" within sec. 74.

Isaacs, K.C., in reply. It is not contended for the respondent that all difficult cases should be taken out of the hands of this Court. This Court, in relation to these matters, is placed, to a large extent, in the same position as that in which the Privy Council is placed in applications to it for special leave to appeal, and considerations which guide the Privy Council should guide this Court. There is no one consideration upon which this Court can conclusively act. The words of the section seem to preclude any consideration of matters affecting other parts of the Empire. No question of the limits *inter se* of the powers of the Commonwealth and those of a State can affect other parts of the Empire. The question, in its most restricted form, for the Privy Council would, in this case, be whether the appellants were improperly assessed to income tax by reason of the Victorian Income Tax Acts conflicting with the legislative or executive power of the Commonwealth. The Privy Council could answer that question for any reason it thought fit.

GRIFFITH, C.J. In this case the Court is called upon to discharge a very responsible and serious duty. We were engaged for some time in listening to very able arguments upon the question in issue between the parties. The question is, we think, one as to the limits *inter se* of the constitutional powers of the Commonwealth and a State. We considered our judgment and have given it, and, by the provisions of the Constitution, our judgment is final and conclusive. That is provided by sec. 73. Then sec. 74 provides that "No appeal shall be permitted to the Queen-in-Council from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers

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of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council. The High Court may so certify if satisfied that for any special reason the certificate should be granted.' The scheme of the Constitution plainly expressed in these sections is that for the determination of these constitutional questions this Court is to be the tribunal of ultimate appeal, unless the Court itself is satisfied affirmatively that there is some special reason which would justify it in certifying that the question ought to be determined by the Sovereign in Council. In my opinion the principles applicable to the granting by the Judicial Committee of special leave to appeal from this Court or from the Supreme Court of a State are not applicable in this case. Grave responsibility is cast upon this Court by the Constitution. We know historically that that responsibility was only cast upon us after long consideration and negotiation. Various proposals were made, and the establishment of the Commonwealth very nearly fell through in consequence of the differences of opinion upon the point. The final solemn determination of the English Parliament, with the assent of Australia, was that that responsibility should be cast upon the High Court. I agree with Mr. Higgins that we should be guilty of a dereliction of duty almost amounting to a breach of trust if we were to decline to accept that responsibility unless we were in a position to say in intelligible language that there was some special reason, capable of being formulated, why the Privy Council was, and why we were not, the proper ultimate judges of the question. That seems to me the only rule that can be applied in determining whether a certificate should be given. What special reason has been suggested for saying that this Court so established—established expressly for that purpose—is not a competent Court to determine this matter finally? Regard must, of course, be had to the nature of the case, and though it is not desirable to discuss a judgment which has already been given, it is necessary to say a word or two as to what are the questions of which it is suggested that we ought not to be the final judges.

The first question raised in the case is whether it is a doctrine of the Australian Constitution that—I quote from the judgment

in *D'Emden* v. *Pedder* (*ante*, p. 91, at p. 111)—"when a State attempts to give to its legislative or executive authority an operation which, if valid, would fetter, control or interfere with, the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent invalid and inoperative." That is the fundamental question in this case. The second question is whether the *Income Tax Act* of Victoria is such an interference as would operate in that way, viz., to "fetter, control, or interfere with the free exercise of the legislative or executive power of the Commonwealth"? That is a mixed question of law and fact. The third question is also a mixed question of law and fact, and it is whether, supposing the income tax would have that effect, the operation of the rule is excluded by not collecting the tax until after the income is received? Those are the three questions, and they are the only questions in the case. Of which of them can it be predicated that it is not fit to be decided by this Court, but that the Privy Council is a better tribunal for its decision? As to the first question, the judgment in *D'Emden* v. *Pedder* (*supra*) has not been objected to. I do not know now whether Mr. Isaacs contends that that decision was wrong. I am unable to gather from him distinctly whether he does or does not. There is no decision in any English Court on the subject, and the only dictum to be found in the English reports that I know of is that of Lord *Hobhouse* in *The Bank of Toronto* v. *Lambe*, 12 App. Cas., 575. In the argument in that case, the judgment of *Marshall*, C.J., in the case of *McCulloch* v. *Maryland*, 4 Wheat., 316, which is to the same effect as that in *D'Emden* v. *Pedder* (*supra*), had been referred to. That decision laid down in regard to the American Constitution the doctrine which we expressed in *D'Emden* v. *Pedder* (*supra*) in the words I have just quoted. Speaking of that case Lord *Hobhouse* said at p. 587:—"Their Lordships have been invited to take a very wide range on this part of the case, and to apply to the construction of the *Federation Act* the principles laid down for the United States by Chief Justice *Marshall*. Everyone would gladly accept the guidance of that great judge in a parallel case. But he was dealing with the Constitution of the United States. Under that Constitution, as their Lordships understood, each State may

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make laws for itself uncontrolled by the federal power, and subject only to the limits placed by law on the range of subjects within its jurisdiction. In such a Constitution, Chief Justice *Marshall* found one of those limits at the point at which the action of the State Legislature came into conflict with the powers vested in Congress."

The only part of those observations which is applicable to the present case are the words: "Everyone would gladly accept the guidance of that great Judge in a parallel case." How does the Constitution of the Australian Commonwealth correspond with that of the United States in this particular? They are identical. The framers of the Australian Constitution deliberately rejected the scheme of the Canadian Constitution, and deliberately accepted that of the United States Constitution; and we are told by the Privy Council that in a parallel case—and this is as parallel as its framers could make it—they would gladly accept the guidance of that great Judge. If, then, that Constitution has been interpreted by that Court for 80 years in a particular way, and the Privy Council tell us that in a parallel case they would accept the guidance of Chief Justice *Marshall*, and then this Constitution is, admittedly, based exactly on the same lines, is it suggested that this Court is not competent to say that the principle so laid down should be accepted as the guiding principle of the Australian Commonwealth? I should feel myself totally unworthy of the position I occupy if I were to give a certificate to that effect.

The second question is whether the Victorian income tax imposed on the salaries of federal officers is an infringement of that rule. Reasons were given in the judgment, which I am not going to repeat—reasons which are obvious to everyone who has had practical experience in administering such a tax—which seem to make the answer to that question self-evident. Upon that question we have the satisfaction of knowing that we merely affirmed a proposition the contrary of which has been denied by every competent authority except the Court now appealed from. We know that 60 years ago the Supreme Court of the United States held that such an income tax was an interference with federal instrumentalities; that 25 years ago the Canadian Courts, under a different Constitution, came to the same conclusion. We

investigated the question for ourselves, and arrived at a conclusion in accord with the Courts both of the United States and of Canada. None of the Canadian decisions have been appealed against. It is the settled accepted doctrine so far as the matter has gone in Canada. Finding the law in that state, can it be said that this is a question we are not competent to decide, and ought not to decide, as the final judges of last resort? I confess I cannot see any ground for certifying that that is a matter that ought to be decided not by us but by the Privy Council.

As to the third question, whether the income tax ceases to be an interference with federal instrumentalities because it is not collected until the salaries have been paid, that seems to be a matter which any tribunal is competent to decide. I have dealt with the questions involved in our judgment because it is impossible to consider whether there is any special reason for certifying that the question ought to be decided by the Privy Council until one knows what are the questions which it is said ought to be left to the Privy Council.

What special reasons have been given why any one of these questions ought to be determined by the Privy Council? The first reason I have listened to with some amazement. We know that the respondent represents the Victorian Government, and we are told that, before the decision of this Court was given, five of the States agreed that, if our judgment should be against Victoria, they would like the matter to be referred to the Privy Council.

That seems to be a very singular sort of argument to address to this Court. The argument was developed as being based not only on the opinion of five premiers, but on the public opinion of Australia. I hope that the day will never come when this Court will strain its ear to catch the breath of public opinion before coming to a decision in the exercise of its judicial functions. If it does so, it will be perhaps the practice, if ever there is a Court weak enough, to adjourn the argument in order that public meetings may be held, leading articles written in the newspapers, and pressure brought to bear to compel the Court to shirk its responsibility, and cast its duty upon another tribunal. We are told that the matter is one of great importance. One matter is of great importance, viz., the power of the States to interfere with the

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Commonwealth. But that is a matter which we are here specially to determine. It is said that the matter affects a large number of persons. I confess that I am unable to see that that is any reason. Is our judgment to be valid only when the matter is easy and unimportant, and will affect only a few persons, and it does not matter much whether the decision is one way or the other? We are then told that there is a difference of opinion between this Court and the Supreme Court of the State. That reason needs only to be stated. The last reason is that our decision is inconsistent with *Bank of Toronto* v. *Lambe* (*supra*). As to that, so far as it has any bearing on this case, our decision is, as I have shown, in entire accord with the opinion expressed by the Privy Council. I therefore think that I should be doing something entirely inconsistent with the responsibility which I undertook when I was placed in the position I now occupy, if I were to say that there is any special reason why this question should be determined by the Privy Council rather than by this Court.

BARTON, J. I agree that this is a case in which the Court should not grant a certificate. Adopting very fully everything said by the *Chief Justice*, I am discharged from the necessity of making any lengthy comment on the materials put before us. But there has been much argument concerning the use of the words "any special reason," in section 74; no other section of the Constitution helps us in construing them. Therefore it is not unreasonable that I should say something about the circumstances under which this section originated. As stated at the bar, it originally appeared in the form adopted at the referendum, namely:—

"No appeal shall be permitted to the Queen in Council in any matter involving the interpretation of this Constitution, or of the Constitution of a State, unless the public interests of some part of Her Majesty's Dominions other than the Commonwealth or State are involved."

A delegation, consisting of men who had taken a prominent part in the movement for federation, was authorized to proceed to England, with a view to assisting the passage, without amendment, of the Constitution endorsed by the people. After their arrival in England, a lengthy controversy arose, practically confined to the terms of clause 74. Those who have read the State papers of the time, which are common knowledge on the subject, will know that the objection entertained by Her Majesty's Govern-

ment to the clause as framed, was largely in respect to the use of the words "public interests." It was from the first conceded, on the one hand, that those who had made this Constitution, were entitled to have it, if possible, adopted with the assistance of Her Majesty's Government, and of the Imperial Parliament, in so far as there was nothing in it which constituted a danger, or might provoke a difficulty with respect to general Imperial interests. On the other hand, it was rightly asserted that the Imperial Government and Parliament stood in the position of trustees of the Empire, and granting the fullest autonomy and self-government to the various colonies in respect of matters purely local, were, nevertheless, charged with the responsibility of seeing that matters which concerned grave public interests outside should form a special charge of the Imperial authorities. That position was asserted by Her Majesty's advisers, and was equally conceded by the delegates. The controversy, then, as to the term "public interests" largely consisted of this, that the legal advisers of the Imperial Government thought the term was too vague to define the class of cases in which there should not be finality in the determinations of the High Court. After very much discussion and negotiation, and the framing of alternative propositions, the terms of the present clause were agreed on, and were subsequently passed as part of the Constitution in substitution for the original clause. It will be evident to anyone who considers what the main controversy was about, that is to say, whether the clause as originally drawn sufficiently protected other parts of the Empire, that the intention was to substitute a provision embodying a due regard to those principles which had been asserted on each side, and conceded in turn by the contending representatives or governments. And so when this provision was drawn and accepted, while I do not say that in its form it would be held, or necessarily held, by the Court to exclude other special reasons, the term "special reasons" was devised so that, at least, those Australian constitutional cases, which involved the public interests of parts of the Empire external to this Commonwealth, might be ultimately decided by His Majesty in Council upon the grant of its certificate by this Court. Still the term "any special reason" has not been defined in the Constitution, and I am quite sensible of the danger of endeavouring to lay down any hard and fast rule as to cases such as this Court may

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hereafter have to deal with. I go only so far as to say that the section, as finally found to be part of the Constitution, was designed, in the first place, to safeguard the right of the people who had framed it, and had voted upon it, to interpret it, and to bring to an end conflicts between Commonwealth and States, by the decision of the Court which that Constitution was calling into existence, and in the same way to deal with cases which arose between two or more States, because in respect of the new self-governing powers constitutional conflicts between two States come within the category of local affairs. Primarily, then, it was intended that this Court should take the responsibility of deciding the class of questions of which that now before the Court is one, while the power of granting a certificate safeguarded that class of cases which was not thought to be adequately protected by the clause as originally framed. It remains to consider whether any special reason has been advanced why the Court should divest itself of the responsibility constitutionally cast upon it, and leave the final determination to the Privy Council. The grant of power to deal with these questions constitutes a burden of which weakness might seek to discharge itself, but which Judges who know their duty will in nowise shirk. The special reasons in such cases must stand outside the common range of those recognised as sufficient to support an application for special leave to appeal, and must justify us in saying we will not take on ourselves the responsibility of final decision. Has any such reason been stated? I must dissent from the proposition that the reasons which the Privy Council considers sufficient to justify it in granting special leave to appeal, are "special reasons" under this section of the Constitution. The very form of the section seems to preclude that argument, and nothing would have been easier than, to use instead of the terms we find here, words which would have made it plain that reasons which would justify the Privy Council in granting special leave to appeal to it, should be sufficient to justify this Court in granting its certificate under this section. It was of the essence of these questions that they should provoke controversy in the country where they arose. Those who framed the provision must have known very well that the Court about to be constituted must often be involved in the decision of questions which would necessitate the exercise of its independence,

and make the highest call upon it to discharge its duty without fear, and that upon such questions controversies must arise, and as between those concerned, apart from this Bench, would sometimes be bitter.

So the thing foreseen was that there would be such controversies, and expressions of public opinion, and therefore such an occurrence cannot be considered a "special reason," otherwise there is hardly any controversy, between Commonwealth and State, or between State and State, which would not afford a special reason, and the main provision would be rendered almost nugatory. A number of grounds have been given by the able counsel who argued this matter. I have disposed in what I have said of the grounds that the case involves matter of great importance, with reference to revenue and State control. All that is of a nature to be expected by those who have to discharge duties such as we have to perform. The fact that the States desire the appeal is a matter which this Court cannot look at, unless it desires to abrogate its own functions. The question is not whether the certificate is desired, but whether it can properly be allowed. That it affects a large number of public servants is a matter which will be common to many decisions of this Court on constitutional questions. I do not think I ought to say a word upon the ground that this Court did not agree with the State Supreme Court. There would be some loss of dignity if either Court were to touch that at all. I pass to the reason that our decision is in conflict with that of the Privy Council in *Bank of Toronto* v. *Lambe* (*supra*). It is impossible for this Court to accept that as a reason, because, having thoroughly examined that case, it finds no reason whatever for thinking that there is a conflict between that decision and its own in the cases just determined, and it finds no reason whatever to apply the circumstances of that case to this, because two cases more distinguishable could not arise. I have been through all the reasons, and taking them collectively or separately, they amount to no more than might be given in ordinary cases. The "special reasons" are not that class of reasons, but something beyond them must be disclosed to entitle the Court to lay down its responsibilities, and ask somebody else to take them up. I cannot say that any special reason has

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been shown, and therefore I concur in the judgment of the *Chief Justice*.

O'CONNOR, J. I agree with the judgments just delivered. In my opinion no ground whatever has been shown for granting the certificate asked for in this case. I do not think it necessary to refer to the historical aspect of the matter, because it appears to me we must interpret the Constitution by the same rules as would guide us in the interpretation of any other Statute, that is to say, we must take as our guide the ordinary meaning of the plain words of the Statute. It is only if we fail to adduce reasonable meaning from them that we can have resort to the history of the clause or the circumstances surrounding the framing of the Constitution. This section seems to me to place a duty upon this Court in the plainest possible language, and that duty is to see that this Court is the final arbiter of all questions arising out of the Constitution, where the rights of State and State, or State and Commonwealth are concerned, unless we think for some special reason that the Privy Council, and not this Court, should be the final arbiter of the dispute. I shall deal with only one of the reasons suggested, and that is that the public opinion of Australia, as it has been called, wishes this Court to grant the certificate in order that the Privy Council may determine this question. I hold so strongly the opinion that upon this Court alone is placed the responsibility of determining the cases in which a certificate ought or ought not to be granted, that if not only the Premiers of the different States, but also the Parliament of each State, and the Parliament of the Commonwealth, all concurred in expressing the opinion that we ought to send the case to the Privy Council, and we in our own consciences believed that we ought not to do so, then we would disregard our duty if we swerved one hair's breadth from our own opinion on the matter. It was urged upon us that in this matter the views of the State Premiers embodied the will of the Australian people. There is only one way in which the Court can know the will of the Australian people, and that is as it is contained in this instrument under which we sit to interpret the laws of the Commonwealth. Until that will as so expressed is altered by an amendment of the Constitution, we can have no regard to any other expression of the will of the people. The will of the people

as represented in the Constitution is that we, and we alone, shall have the responsibility of determining the cases under sec. 74 which ought to be finally decided by us, and the cases which ought to be decided finally by the Privy Council. In that sense we have been made, not only the interpreters, but the guardians of the Constitution. That is to say, the duty has been placed upon us, not only to see that we interpret the Constitution according to our best judgment, but to take care, also, that, except under very exceptional circumstances, we do not allow the interpretation to fall into any other hands. So strongly do I feel that that duty has been cast on myself as a member of this Court, that I have no hesitation in saying, if we found that by a current of authority in England, it was likely that, should a case go to the Privy Council, some fundamental principle involved was likely to be decided in a manner contrary to the true intent of the Constitution as we believed it to be, it would be our duty not to allow the case to go the Privy Council, and thus to save this Constitution from the risk of what we would consider a misinterpretation of its fundamental principles. Holding these views, I am very strongly of opinion that no grounds whatever have been shown in this case for a certificate. It is impossible, and undesirable, if it were possible, to lay down any rule for the exercise of this power to issue a certificate. In the course of years many questions may arise in which this Court may have to consider whether, in the interests of the Constitution itself, a case should be remitted to the Privy Council for final determination. When those cases arise, this Court, however constituted, will, I have no doubt, pronounce its opinion to the best of its judgment. All I can now say is that that case has not arisen here, and I sincerely trust that it will never be supposed that upon grounds anything like those put forward in this case we should be asked to exercise the power of depriving ourselves of the right of being the final arbiters in disputes between State and Commonwealth, or between State and State.

Motion dismissed with costs.
Certificate refused.

Solicitors, for appellants, *George Turner & Son*, Melbourne.
Solicitor, for respondent, *Guinness*, State Crown Solicitor.