2. To be paid immediately after sale.

5. Dugald takes a vested interest in one-sixth of the residue of the remaining three-fourths after payment of the legacies and annuity.

6. To be paid immediately after the sale, subject to provision for the payment of the annuity.

*Appeal allowed. Order varied. Questions answered as above. Costs of all parties as between solicitor and client out of the estate.*

Solicitor, for appellants, *J. H. Maddock*, Melbourne,

Solicitors, for respondents, *G. S. Mackay*, Warrnambool; *A. A. Sinclair*, Melbourne.

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THE COMMONWEALTH . . . . . PLAINTIFF,

AND

THE STATE OF NEW SOUTH WALES . DEFENDANT.



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

*Taxation of Commonwealth instrumentality by State—Powers of States—Stamp Duty on transfer of Property—Land in State acquired by Commonwealth for Public purposes—Statute not binding on Crown—Stamp Duties Act (N.S.W.), (No. 27 of 1898), sec. 23—Real Property Act (N.S.W.), (No. 25 of 1900)—Property for Public Purposes Acquisition Act (No. 13 of 1901), sec. 3—The Constitution, sec. 51.*

By sec. 4, schedule 2 of the *Stamp Duties Act* (N.S.W.) 1898 *ad valorem* duty is payable on every conveyance or transfer on sale of any property; and sec. 23 of that Act provides that no unstamped instrument required by the Act to be stamped shall be registered or capable of being registered in any office.

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*Held*, that a memorandum of transfer of land held under the *Real Property Act*, (N.S.W.) to the Commonwealth for Commonwealth purposes under sec. 3 of the *Property for Public Purposes Acquisition Act* 1901, is not liable to stamp duty under sec. 2, sched. 4, and therefore the Commonwealth is entitled to have such instrument marked exempt by the Commissioner for the purpose of registration under the *Real Property Act*.

The *Stamp Duties Act* (N.S.W.), was not intended to impose, and did not impose, any obligation upon the Crown when it was passed, and therefore does not now impose any obligation upon the Commonwealth. Even if the Act, when passed, did affect the Crown as representing the community of New South Wales, it could not, after the establishment of the Commonwealth be construed as affecting the Crown as representing the Commonwealth.

*Held* further, that the transfer by the vendor was a necessary instrumentality of the Commonwealth for the acquisition of land for public purposes, and was therefore exempt from State taxation under the rule laid down in *D'Emden* v. *Pedder*, 1 C.L.R., 91, at p. 111.

*Snyder* v. *Bettman* 190 U.S., 249, and other cases in the United States of America, as to the validity of a State law imposing succession duty on federal property, distinguished.

SPECIAL CASE.

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

On 28th July 1904 a memorandum of transfer of a certain area of land at Paddington, Sydney, from a number of private persons and the Perpetual Trustee Company Ltd., to the Commonwealth of Australia was produced to the Commissioner of Stamp Duties under the *Stamp Duties Act* (N.S.W.) (No. 27 of 1898) with a request that it should be marked by him as exempt from the duty imposed by that Act upon conveyances or transfers on sale of any property.

The land in question was under the provisions of the *Real Property Act* (N.S.W.) (No. 25 of 1900), and was purchased by the Commonwealth under the *Property for Public Purposes Acquisition Act* 1901, as a site for a post office. Registration of the memorandum of transfer under the provisions of the *Real Property Act* (N.S.W.) was necessary in order to obtain a registered title to the land conveyed, and the request for exemption was made with a view to subsequently obtaining registration,

because the Registrar-General would decline to register the transfer unless stamped or marked exempt from stamp duty by the Commissioner. The Commonwealth claimed that stamp duty was not payable in respect of the memorandum of transfer. The memorandum was prepared on behalf of and at the expense of the Commonwealth, and was handed over by the vendors together with the relative certificate of title in the names of the vendors on payment to them of the purchase money.

The Commissioner of Stamp Duties claimed that stamp duty was payable in respect of the memorandum of transfer, and accordingly assessed the duty at £5 10s., which was at the rate of 10s. per centum on the amount of the purchase money, and remitted the fine for late stamping. This sum was paid by the Commonwealth to the Commissioner under protest, and this action was brought to recover it.

The amount was admitted to be correct if stamp duty was payable at all, and the question of law submitted for the opinion of the Court was whether stamp duty in respect of a memorandum of transfer of land to the Commonwealth under such circumstances was payable under the *Stamp Duties Act* (N.S.W.).

It was agreed between the parties that should the judgment of the Court be in the negative, the sum paid under protest, with costs of the cause, should be paid by the defendant to the plaintiff, and should the judgment be in the affirmative, the costs of the cause should be paid by the plaintiff to the defendant.

*Cullen* K.C. (with him *Bavin*), for the appellant. Taxation of this document is an interference with the instrumentalities of the Commonwealth. The carrying on of the business of the post office necessitates the acquisition of land by the Commonwealth. This land in question was acquired by the Commonwealth in the exercise of its powers under the *Lands for Public Purposes Acquisition Act* 1901, and the State has no power to levy a toll upon such a transaction. [He referred to *Ambrosini* v. *United States* (1); *Stirneman* v. *Smith* (2); *Harvard Law Review*, Feb., 1906, p. 286.]

The Crown is not mentioned in the State Act under which the

(1) 187 U.S. 1. (2) 100 Fed. Rep., 600.

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stamp duty is claimed; therefore on that ground the claim must fail. The Commonwealth is the Crown, in the same way as the Government of the State, and as the Crown it holds this land for purposes of State, not as private property. [He referred to *Hardcastle on Statutory Law*, 2nd ed., p. 407.] Even if the Crown had been mentioned in the State Act, that would only have bound the Crown as representing the Government of the State of New South Wales, not that of any other State or of the Commonwealth: *The Municipal Council of Sydney* v. *The Commonwealth* (1). Any attempt to make the Act extend to other Governments is invalid: *D'Emden* v. *Pedder* (2); it is repugnant to their sovereignty: *California* v. *Central Pacific Railroad Co.* (3); *Home Insurance Co.* v. *New York* (4); *Commonwealth* v. *Baume* (5). A State cannot raise revenue by taxing the acquisition of property by the Commonwealth or its agents: *Deakin* v. *Webb* (6); *Roberts* v *Ahern* (7).

[He referred also to *Public Works Act* (N.S.W.), No. 26 of 1900, sec. 40.]

*Gordon* K.C. (*C. B. Stephen* K.C. and *Flannery* with him), for the respondent. The principle as to the immunity of sovereign powers from taxation is not disputed; but it does not apply to the present case. The Commonwealth Act, No. 13 of 1901, sec. 3, gives the Commonwealth Government power to make agreements with owners for the absolute purchase of land for public purposes. If, however, the Commonwealth acquires property under that section in a State, it is bound by any special State provision dealing with the acquisition of land in the State. All sovereign States have power to regulate the tenure or mode of acquisition of land within their own boundaries, and also to impose limitations and restrictions upon its transfer *inter vivos* and by descent: *United States* v. *Fox* (8). Personal property bequeathed to the United States was held liable to pay succession duty or inheritance tax to the State of New York, within whose territorial jurisdiction it was situated: *United States* v. *Perkins* (9).

(1) 1 C.L.R., 208, at p. 232.
(2) 1 C.L.R., 91, at p. 111.
(3) 127 U.S., 1.
(4) 134 U.S., 594.
(5) 2 C.L.R., 405.
(6) 1 C.L.R., 585.
(7) 1 C.L.R., 406.
(8) 94 U.S., 315.
(9) 163 U.S., 625.

Such a tax is not upon the property, but upon the right to dispose of it, and is in a sense a payment for the privilege of doing so. [He referred to *Cooley on Taxation*, 3rd ed., c. 3, sub-sec. 3; *In re Merriam* (1); *Moore* v. *Moore* (2); *Magoun* v. *Illinois Trust and Savings Bank* (3); *Plummer* v. *Coler* (4).]

Land under the *Real Property Act* (N.S.W.) is not merely land with its ordinary incidents. It has many advantages attached to it, such as facilitation of proof of title, which are purely the creation of the Statute. It makes no difference that the tax is imposed by a different Act from that which created the form of tenure.

[BARTON J.—Does not the power of the Commonwealth to acquire the land proceed from its own Act, not from that of the State?]

The Commonwealth Statute is passed by virtue of the powers conferred by the Constitution, but it does not confer the privileges attached to real property which has been brought under the State Act. Until registered under the latter Act the instrument passes no interest under the Act, and it cannot be registered under that Act until stamped under the *Stamp Duties Act* (N.S.W.), No. 27 of 1898.

The common law conveyance is still effective to pass the title, but it does not confer the advantages attached to land brought under the *Real Property Act*. The Crown is not entitled to get the benefit of the Statute unless it also undertakes the burdens imposed by it. [He referred to *Re Martin*; *Ex parte The Commissioners of Taxation* (5); *Re Baynes and others*; *Ex parte The Attorney-General* (6).

[O'CONNOR J.—Were not all the American cases in which the tax was held to be valid cases of testamentary disposition or inheritance? The power to dispose of property by will or descent is always a statutory power, and the State which confers the power may impose conditions upon its exercise.]

There is no distinction in principle between disposition *inter vivos* and by will or descent, if the privileges in question are the

(1) 141 N.Y.R., 479, at p. 484.
(2) 47 N.Y.R., 467.
(3) 170 U.S., 283.
(4) 178 U.S., 115.
(5) (1905) 5 S.R. (N.S.W.), 181.
(6) 9 Q.L.J., 33.

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creation of Statute: *Knowlton* v. *Moore* (1). The *Stamp Duties Act* does not prevent the Commonwealth from acquiring land and disposing of it as it pleases; it merely provides that unless the Commonwealth complies with certain requirements it shall not become entitled to certain additional privileges. The only instruments that require registration are those which purport to be made under the Act: *Cuthbertson* v. *Swan* (2).

[GRIFFITH C.J.—Do you contend that the *Stamp Duties Act* in its terms extends to the Crown?]

It has been construed as applying to the Crown. Whenever the State Government acquires land by purchase and takes a transfer by an instrument under the *Real Property Act*, it pays the stamp duty. The fact that certain Crown transactions are specifically exempted from the payment of stamp duty justifies the inference that, but for the exemption, the Crown would be liable as a general rule. [He referred to secs. 15 and 47 of the *Stamp Duties Act* 1898.] The duty claimed here is not open to the objection that it would be levying a charge from the Crown for the benefit of the Crown, because the treasury of the Crown as representing the State is wholly distinct from that of the Crown as representing the Commonwealth.

[O'CONNOR J. referred to *Williams* v. *Howarth* (3).]

*Cullen* K.C., in reply. Sec. 51 (xxxi.) of the Constitution confers the power to legislate for the acquisition of property on just terms from any State or persons for public purposes, and the Act No. 13 of 1901 is an exercise of the power. Sec. 4 of the latter Act provides that land may be sold and conveyed to the Commonwealth, and, by sec. 2, "convey" means "convey, transfer, or release," which must include a transfer under the *Real Property Act*. The State, therefore, cannot interfere with this right. There is a wide distinction between a power or privilege of the State's creation, such as that of a testator to dispose of his estate, and the power of the Federal Government to acquire property for public purposes. [He referred to *Snyder* v. *Bettman* (4), and *The Municipal Council of Sydney* v. *The Commonwealth* (5).]

(1) 178 U.S., 41.
(2) 11 S.A.L.R., 102.
(3) (1905) A.C., 551.
(4) 190 U.S., 249.
(5) 1 C.L.R., 208, at p. 229.

The duty imposed upon registration is not a mere incident of the transfer of land, it is a means of safeguarding the revenue, the sole object of the tax being revenue. If the power to forbid registration exists at all it exists without limit, and therefore the argument must go to this extent, that the State may make land inalienable notwithstanding the provision of the Constitution. By that the right of a State to regulate or control the tenure of land has been cut down to the extent mentioned, so that in any case in which the Commonwealth decides to acquire property, the procedure prescribed by the Parliament of the Commonwealth is to be followed, and the State may not interfere. Whether the tax is an incident of the tenure of land in New South Wales, or a tax upon the instrument or the transaction, and even if it would have been binding upon the Commonwealth but for legislation by the Commonwealth, it is no longer so since the passing of the *Lands for Public Purposes Acquisition Act* 1901.

*Cur. adv. vult.*

The following judgments were read:

GRIFFITH C.J. The question for determination in this case is whether an instrument whereby land held under the *Real Property Act* is transferred to the Commonwealth for Commonwealth purposes is liable to *ad valorem* stamp duty under the New South Wales *Stamp Duties Act* (No. 27 of 1898). That Act, which was passed before the establishment of the Commonwealth, imposed upon conveyances on sale an *ad valorem* duty to be calculated according to the amount or value of the consideration for the sale. The duty, it is to be observed, is imposed upon the instrument and not upon the transaction, so that, in the case of a sale which is effectuated without a conveyance, no duty is payable. The Act provides that unstamped instruments shall not be admissible in evidence (sec. 15), or registered in any Court or office (sec. 23). The first question for consideration is whether this Act when it was passed affected the Crown, in the sense that it required the Crown to pay stamp duty. For, if the Act did not affect the Crown as representing the community of New South Wales, it could not, in my judgment, after the establishment of the Commonwealth be construed as affecting the Crown as repre-

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senting the Commonwealth, *i.e.*, the community of New South Wales plus the other States, any more than it could be construed as affecting the Crown as representing the whole Empire, in the case, for instance, of a conveyance of land to the Admiralty. This was, indeed, not contested by the learned counsel for the defendant. But they contended that the Act did affect the Crown, and pointed out that the Schedule of Duties expressly excepts some Crown documents, *e.g.*, receipts given by government officers for money received by them for the Government. It is, no doubt, a general rule that the Crown is not bound by a Statute unless named in it, or unless it otherwise appears that it was the intention of the legislature that it should be bound. When this rule is sought to be applied, the mention of the Crown in the Statute is generally sufficient to exclude its application. But, in my opinion, this rule is only an instance of a wider rule which was stated by this Court in *Roberts* v. *Ahern* (1), in these words: "The modern sense of the rule, at any rate, is that the Executive Government of the State is not bound by Statute unless that intention is apparent." Applying this rule, how can it be seriously contended that it was the intention of the legislature that one department of the Executive Government should contribute to another, the Treasury, a sum of money which must itself be first provided by the Treasury for the purpose of the payment? This would at best be a mere matter of bookkeeping. In my opinion the intention of the legislature in the *Stamp Duties Act* 1898 is quite clear. It was to raise revenue, and for that purpose to impose liabilities on the subject, and not to deal with matters of departmental accounts. Nor do I think that the express exceptions in the Schedule affect this conclusion. The Crown is, as a matter of necessity, mentioned in, and beneficially affected by, every taxing Act. For these reasons I am of opinion that the *Stamp Duties Act* 1898 did not impose any obligation upon the Crown when it was passed, and does not now impose any upon the Commonwealth.

This is sufficient to dispose of the case, but there is another and independent ground upon which the plaintiff is, in my opinion, entitled to judgment. The Constitution empowers the

(1) 1 C.L.R., 406, at p. 418.

Parliament of the Commonwealth to make laws for the acquisition of property from any State or person for any purpose in respect of which the Parliament has power to make laws (sec. 51 (xxxi). In the exercise of this power the Parliament passed the *Property for Public Purposes Acquisition Act* (No. 13 of 1901), by which provision was made for the acquisition of land from private persons either by agreement followed by a conveyance in the ordinary manner (sec. 3), or by a notification published in the *Gazette* (sec. 6). In my opinion the acquisition of land includes obtaining a title to the land in accordance with the laws of the State. It follows that the conveyance by the vendor in the case of agreement, or the notification in the *Gazette* in other cases, is a necessary instrumentality for the acquisition of the land. And I think that the taxation by a State of such an instrumentality falls within the rule laid down in *D'Emden* v. *Pedder* (1):—"It follows that when a State attempts to give to its legislative or executive authority an operation which, if valid, would fetter, control, or interfere with, the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent invalid and inoperative. And this appears to be the true test to be applied in determining the validity of State laws and their applicability to federal transactions."

It was pointed out in that case that the attaching by a State law of any condition to the discharge of a federal duty is an act of interference or control. So also is the attaching of a condition to the performance of any federal function. I am, therefore, of opinion that, if the *Stamp Duties Act* 1898 were construed as in terms affecting the Commonwealth Government, it would be to that extent inconsistent with the law of the Commonwealth. We were referred to several cases in the Supreme Court of the United States of America, in which it has been held that a succession duty imposed by a State law is valid as affecting property given by the predecessor to the United States. The reasoning in most of these cases proceeded on the ground that the payment of succession duty is a condition attached to the right of transmission under the State law, by which alone the right of succession is

(1) 1 C.L.R., 91, at p. 111.

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governed. In the latest case *Snyder* v. *Bettman* (1), decided in 1902, the majority of the Court (*Fuller* C.J. and two other learned Justices dissenting) held that such a duty might be rested on the general power to tax all property, and that, if the tax was imposed upon it while in the hands of the administrator, it was not obnoxious to the rule prohibiting the taxation of State agencies or property. But, in my opinion, the reasoning in these cases is not applicable to an ordinary stamp duty imposed upon instruments *inter vivos*. The obligation to pay such a duty is no more a part of the law of real property, or of the alienability of real property, than an obligation to stamp a bill of exchange or promissory note is a part of the law merchant. The distinction between purely fiscal Statutes and Statutes relating to the ownership and disposition of property is well settled. I do not, therefore, think it necessary to refer to the American cases at greater length.

For these reasons, I think that judgment must be given for the plaintiff.

BARTON J. The Commonwealth bought for £1,100 a piece of land in a suburb of Sydney in the State of New South Wales as a site for a Post-office. The land, for which there was a certificate of title under the *Real Property Act*, (No. 25 of 1900), was acquired by purchase from private owners under the authority of sec. 3 of the *Property for Public Purposes Acquisition Act* 1901, a Statute of the Commonwealth passed in exercise of the legislative power granted by the Constitution in sec. 51 (xxxi). The memorandum of transfer was produced to the Commissioner of Stamp Duties on the 28th of July last with the request that he would mark it as exempt from stamp duty. That request was refused. Unless stamped or marked by the Commissioner as exempt from stamp duty, the document would be refused registration by the Registrar-General; that is, the complete registered title under the Act could not be obtained. The Commonwealth contends that the instrument is not liable to stamp duty and claims from the State of New South Wales the return of £5 10s., being duty at the rate of 10s. per cent on the consideration money of £1,100, such duty having been paid to the Commissioner for stamp duties

(1) 190 U.S., 249.

under protest. If this Court is of opinion that the duty was not payable, judgment is to be for the Commonwealth for £5 10s. and costs of action. If the duty is held to be payable, the State of New South Wales is to have judgment with costs.

The Constitution, sec. 51 (xxxi.) gives the Federal Parliament power to make laws with respect to "the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws." The *Property for Public Purposes Acquisition Act* 1901, (No. 13 of 1901), provides for two modes in which the Commonwealth may acquire land for public purposes, namely acquisition by purchase and compulsory acquisition. As to the first-named mode, sec. 3 gives the Executive power to agree with the owners of any land required for any such purpose for the absolute purchase of such land by the Commonwealth for a consideration in money or its equivalent: and sec. 4 gives the owners of such land power to sell and convey it to the Commonwealth.

The State Act (No. 27 of 1898), which consolidates the laws relating to stamp duties, imposes, *inter alia*, a duty on the conveyance or transfer on sale of real property of 10s. for every £100 of the amount of the consideration money: (Sec. 4 and Schedule 2). Sec. 15 (1) of the same Act provides that, unless otherwise therein expressly enacted, "no unstamped instrument executed in New South Wales . . . or relating, wheresoever executed, to any property situate . . . in New South Wales, shall, except in criminal proceedings, be . . . available or effectual for any purpose whatsoever in law or equity." By sec. 23, no unstamped instrument required by the Act to be stamped is to be registered or capable of being registered in any Court or office. Hence the Registrar-General will not receive for entry in the register book any unstamped instrument unless it falls within the exemptions specified in the Schedules to the *Stamp Duties Act* 1898, and is marked by the Commissioner of Stamps as so exempt. And until registered under the *Real Property Act* (No. 25 of 1900) no instrument is effectual to pass any estate or interest in any land under the provisions of that Act (sec. 41 (1)).

The contention for the Commonwealth, that the instrument is not liable to duty, rests on two grounds: first, that the *Stamp*

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*Duties Act* 1898 does not bind or affect the Government of the Commonwealth so as to make conveyances or transfers to it liable to duty; secondly, that the duty, so far as it is claimed to be chargeable on a conveyance or transfer of land acquired by the Commonwealth for a public purpose, such as the carrying on of the business of a Department of State, like the Postal Department, is an interference with an instrumentality of the Federal Government, and as such cannot be enforced.

As to the first ground it was properly conceded on behalf of the defendant State that if the Crown, in the sense of the Executive Government of New South Wales, is not bound, so neither is the Crown in the sense of the Executive Government of the Commonwealth. But is it possible to contend seriously that a taxing Act of this State binds the Government of it so as to include the transactions of that Government in the scheme of taxation? No express provision is pointed to as affecting the Crown in this way. Is the Crown then included here by implication? Although we find some exemptions in the Second Schedule from which it is argued that, as the legislature thought it necessary to express them, it must have thought that, unless the exceptions were named, the Crown would be bound in these instances, and therefore it is bound in others not expressed, I think a very different inference is fairly to be drawn from these items in the Schedule. Inasmuch as the taxable documents are in some instances so widely described that, without further definition, an argument might be raised that certain documents ordinarily taken by Government officials were included, these are made the subject of express exemption in the Schedule in order to put it beyond all doubt that they are no more aimed at than any other transactions of the Crown, having regard to the fact that nowhere among the sections of the Act is a word to be found from which an intention to bind the Crown can be inferred. At the worst, it cannot be said that any implication which can be raised from the sections to affect the Crown is a necessary implication. But, as *Story* J., cogently put it in *The United States* v. *Hoar* (1), "where the Government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischief to be redressed,

(1) 2 Mason (U.S. Circuit Court), 311.

or the language used, that the Government itself was in contemplation of the legislature, before a Court of law would be authorized to put such a construction upon any Statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens, and in most cases the meaning applicable to them applies with very different and often contrary force to the Government itself. It appears to me, therefore, to be a safe rule founded on the principles of the common law that the general words of a Statute ought not to include the Government unless that construction is clear and indisputable upon the text of the Act." But further, the whole purpose of this Statute gives a negative to the idea that it was intended the Crown should be bound by it. If "it is inferred *primâ facie* that the law made by the Crown, with the assent of Lords and Commons, is made for subjects and not for the Crown," as stated by *Alderson* B., in *Attorney-General* v. *Donaldson* (1), must not such an inference arise with redoubled strength when the subject matter is taxation? Sec. 4 says " . . . subject to the exemptions contained in the Second and Third schedules hereto, there shall be charged, levied, collected and paid *for the use of Her Majesty* . . . the several duties or sums of money" and so on. The revenue raised is for the use of the Crown, to form part of the Consolidated Revenue. The revenue is granted to the Crown. It is the object of the taxation to raise that revenue, and the intention to apply it to the purpose of Government. How can any such object or purpose be served by exacting the duties from the Government? They can only be paid by its Departments, who in turn must draw the wherewithal from the public funds—that is from the Treasury. How can the Government enlarge its revenue by paying one tax out of the proceeds of another?

On every ground, then, I come to the conclusion that the Act was not intended to, and does not bind or affect the Crown, whether in the sense of State or Commonwealth.

This conclusion is sufficient to dispose of the whole case, but it is perhaps expedient to deal with the second ground on which the Commonwealth relies, viz., that in this case an attempt is made to tax a federal instrumentality, and that such an attempt

(1) 10 M. & W., 117, at p. 124.

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cannot be held to possess the sanction of the law of the Constitution.

A law passed by a State under which an instrument necessary for the acquisition of property by the Commonwealth for the purpose of carrying on the federal Government is sought to be taxed, would, one would think, beyond all need of argument, be interpreted as an interference with the functions or instrumentalities of the Commonwealth. *Primâ facie*, it must be so. Because without land for post offices, the business of that department cannot be carried on at all. If there is anything to which the expression "instrumentality" could be applied it is the acquisition of land for the purposes of carrying on federal administration. But while the general rule is admitted, it is alleged that the case is taken out of that rule by certain American decisions that were cited, which it is not necessary to deal with in detail. In the first place, it may be pointed out that none of these cases have reference to the transfer or conveyance of property; they deal solely with the case of succession to property. They are cases of taxation upon the transmission of property by will. Now, it appears clearly from a perusal of these cases that the tax is not upon the property itself. The tax in the case of *United States* v. *Perkins* (1) was upon the transmission by will or by descent, and it is described in all these American authorities as a condition of the enjoyment of the privilege given to the testator, or the intestate, of transmitting his property without interference. In that sense it is a condition imposed by the State itself on the enjoyment of a privilege which it has itself conferred by its own Statutes. Leaving aside the fact that the doctrine has never been asserted as to any dealing with property except by will or descent, and that there is no authority for the application of it to the case of a transfer or conveyance, it is supported on the theory I have mentioned, that it is an exercise by the State of its power to limit a privilege which it has itself granted, and which could not be enjoyed but by its permission. Now, it is sufficient to point out that it is not the State which grants the privilege to the Commonwealth in this matter. The right of the Executive Government to acquire property for any purpose which the

(1) 163 U.S., 625.

Commonwealth has power to carry out can only be granted by the Commonwealth itself, by legislation within the powers conferred upon it by the Constitution to make laws on that subject. The origin of the privilege therefore cannot be attributed to any concession made by a State. Taking the State legislation as it was in 1901, at the establishment of the Commonwealth, the Commonwealth was totally unable, except in respect of those matters which were automatically transferred or might become transferred to it by proclamation of the sites of the departments, to acquire land, simply by reason of the fact that it had not made any law for that purpose. But when it made that law the power under it was conferred upon itself by that law. In this case it was the *Property for Public Purposes Acquisition Act* 1901. Such a transaction or proceeding cannot for one moment be classed with those laws of States which allow as a privilege the transmission of property by will or by descent. Thus the suggested construction of the tax as a condition imposed upon the enjoyment of a privilege is out of the question, inasmuch as no privilege is conferred by the State. There is a voluntary exercise by the Commonwealth of its powers. Consequently, the very reason by which State taxing enactments of the kind have been justified is absent, and the second defence can no more prevail than the first. It was further urged that this tax was justifiable as an incident of property. I cannot bring myself to regard as an incident of property that which is dependent upon the pecuniary needs of the State for the purposes of its own revenue, and is a condition of things which must vary even as to its existence with those needs. It is purely a revenue tax.

I am of opinion, for all these reasons, that the Commonwealth is entitled to judgment in this case.

O'CONNOR J. It would be a sufficient answer to the claim for stamp duty to hold that the Crown, as representing New South Wales, was not bound by the New South Wales *Stamp Duties Act* 1898, and that *à fortiori*, the Crown as representing the Commonwealth was not bound. Concurring as I do with the judgment of my learned brothers on that part of the case, I would not add another word were it not for the important

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questions which have been raised as to the rights of the Commonwealth and of the State in regard to transfers of land purchased by the Commonwealth for public purposes. For the purpose of my observations on this part of the case I shall state the matter in controversy. The Constitution has by sec. 51, (xxxi.) empowered the Commonwealth Parliament to make laws for the peace, order, and good Government of the Commonwealth with respect to "the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws." In pursuance of that power the *Property for Public Purposes Acquisition Act* 1901 was passed. It provides for the acquisition of land for public purposes by two methods. The first method is by purchase from a voluntary seller in the ordinary way, the second is by a compulsory taking of the land with compensation to the owner. We are only concerned with the first method. Sec. 3 merely gives authority to the Commonwealth to make the purchase. Sec. 4 sets out in some detail the class of persons who may convey their interest to the Commonwealth, and authorizes the exercise of certain powers of sale by married women, guardians, trustees, executors, administrators, and other persons named in conveying lands to the Commonwealth. The Statute has thus not only empowered the Commonwealth to purchase lands for public purposes, but has, to the extent deemed necessary for conveniently conveying a clear title, declared in certain cases the rights of vendors to the Commonwealth and the incidents of estates conveyed. No State legislation would be valid which affected the right of the classes of persons named to transfer to the Commonwealth, or which restricted or hindered the exercise of those powers, and all existing State laws inconsistent with the exercise of those powers and rights became, under sec. 109 of the Constitution, void to the extent of the inconsistency on the passing of the *Property for Public Purposes Acquisition Act* 1901. Under the powers of that Act the Commonwealth purchased some land in the State of New South Wales for a post office. The land was under the *Real Property Act* 1900, and title to such land cannot therefore be effectually acquired unless by following the mode of transfer prescribed by the *Real Property Act* 1900. The prescribed mode of transfer was followed, and the

transfer to the Commonwealth, so far as the parties to the contract were concerned, was completed. But, in order to make the act of the parties effectual, it became necessary to register the transfer under sec. 41, which enacts that no instrument until registered under the Act shall be effectual to pass any estate or interest in land under the Act. Registration of the transfer was therefore essential to vest in the Commonwealth any estate or interest in the land thus intended to be acquired in the exercise of its powers. The State officials refused registration of the transfer until a certain condition was complied with; that condition was the payment of stamp duty on the transfer under the *Stamp Duties Act* 1898. It is admitted that, if the Commonwealth were not a party to the document, the document would be liable to stamp duty and that the Registrar would be right in refusing to register it until the stamp duty was paid. But it is contended on behalf of the Commonwealth that the Registrar can impose no such condition on the registration of an instrument vesting in the Commonwealth lands which it is acquiring in exercise of its powers under Statute authorizing the purchase of the land. The question we have to determine is whether that contention is right. The *Stamp Duties Act* 1898 is simply a revenue Statute. It imposes stamp duty on certain documents of transfer, and, with the object of insuring payment of the duty, it provides in sec. 15 that, with certain exemptions, no unstamped instrument relating to property in New South Wales shall be admissible in evidence or available or effectual for any purpose whatsoever in law or equity. For the same purpose it prohibits by sec. 23 the registration in any Court or office of any unstamped instrument, and makes liable to a penalty any officer who knowingly registers or permits to be registered any such unstamped document. The collection of the tax is still further secured by the *Amending Stamp Duties Act* 1904, which by the joint operation of sec. 17 and the Second Schedule renders the transferee in a case of this kind liable to be fined on summary conviction if the document is not stamped within a certain period after execution. Mr. Gordon contended that in its application to the *Real Property Act* this was not merely a revenue law, but a law regulating the transfer of property within the State, and

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thus the obligation to stamp a transfer was an incident of real property law of the State. But regard must be had to the substance, not to the form of an enactment, and it is clear to my mind that the *Stamp Duties Act* is neither more or less than a revenue Statute, which, in addition to making failure to pay stamp duty an offence punishable by fine on summary conviction, ensures collection of the duties imposed by compelling stamping as a condition precedent to the taking of necessary steps in the transfer of real property. A suggestion was made by Mr. Gordon that the registration of the transfer was not the only means by which the Commonwealth could acquire an indefeasible title, that it was open to them to use their compulsory powers and have the notification registered under sec. 61 of the *Property for Public Purposes Acquisition Act* 1901, in which case it is clear that the State could impose no condition or restriction on the vesting of the land. But the Statute gives the Commonwealth the choice of either method, and, if the State could force it to adopt one method rather than the other, it would have a power of interference in the exercise of Commonwealth functions which would seriously impair their effectiveness. The whole controversy, therefore, is reduced to the question can the State impose a tax upon that document of transfer by which alone the Commonwealth can obtain title to land acquired by purchase in the exercise of its powers? In view of the principles laid down by this Court in *D'Emden* v. *Pedder* (1), and *Deakin* v. *Webb* (2), it is impossible to hold that a State can legally impose such a tax under such circumstances. Those principles are now so well known and recognized in the interpretation of our Constitution that it is no longer necessary to state the arguments by which they are to be supported. But it will, I think, be useful to quote two passages from the judgment of the Court in *D'Emden* v. *Pedder* (3) which have a direct application to the question under consideration :— "It must, therefore, be taken to be of the essence of the Constitution that the Commonwealth is entitled, within the ambit of its authority, to exercise its legislative and executive powers in absolute freedom, and without any interference or control what-

(1) 1 C.L.R., 91. (2) 1 C.L.R., 585.
(3) 1 C.L.R., 91, at pp. 110 and 111.

ever except that prescribed by the Constitution itself." Again: "It follows that when a State attempts to give to its legislative or executive authority an operation which, if valid, would fetter, control, or interfere with, the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent invalid and inoperative. And this appears to be the true test to be applied in determining the validity of State laws and their applicability to federal transactions."

If the tax can lawfully be imposed, its amount, time of incidence, and method of collection cannot be controlled by the Commonwealth. It would be impossible, therefore, for the Commonwealth to effectually exercise its power of vesting in itself an indefeasible title to lands purchased in the exercise of its powers without submitting to payment of such tax as the State might from time to time by its Statutes impose, as a condition of being permitted to take the necessary steps to complete their title. How can it be said that the exercise of a power under such conditions is the full, free, unfettered exercise of the power which the Constitution has vested in the Commonwealth for the acquisition of lands for public purposes ?

Mr. Gordon admitted, of course, the principle laid down in *D'Emden* v. *Pedder* (1), but contended it was not applicable to the circumstances. Laws regulating the transfer of property are, he argued, within the exclusive jurisdiction of the State. If the Commonwealth chooses to purchase land in a State it must purchase subject to the condition which the laws of the State may impose on the making of the transfer. Payment of the stamp duty on acquisition, he contended, is merely one of the conditions of transfer imposed on persons who wish to obtain the benefit of a *Real Property Act* title. That is a condition with which the Commonwealth must comply if it would take the advantages of a title under the *Real Property Act*. In support of his contention Mr. Gordon relied upon the *United States* v. *Fox* (2) and a series of cases following that decision. These cases in my opinion are not applicable. In none of them was there any interference with a

(1) 1 C.L.R., 91.

(2) 94 U.S., 315.

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power being exercised by the United States. The United States was in those cases the recipient of benefits conferred upon it by individual citizens, and it was held that they took the benefits subject to the conditions which the State laws attached to such benefits. It must also be remembered that the power of the United States to acquire land in a State for public purposes was not granted expressly by the Constitution, but has been implied of necessity in the interpretation of that Constitution, and the power implied does not go beyond the necessity, and therefore leaves the States free to regulate the transfer of property within their boundaries in all cases. But under our Constitution the express power conferred to make laws relating to the acquisition of property in the States involves the power to alter the State laws of property and methods of transfer so far as may be necessary for the effective exercise of the power. The *Property for Public Purposes Acquisition Act* 1901, passed in pursuance of that power, has, as I have pointed out, declared in several particulars the law which is to be applied to sales of property to the Commonwealth. Any State law inconsistent with the law so declared would be void whether it purports to effect its object as a revenue Statute or as one merely regulating the transfer of property. In my opinion, therefore, the American decisions dealing with laws and circumstances so different do not support Mr. Gordon's argument, and his contention in itself cannot be sustained in view of the large powers of legislation in respect of lands acquisition conferred on the Commonwealth Parliament by our Constitution. For these reasons I am of opinion that the principle of *D'Emden* v. *Pedder* (1) applies, and that the imposition of the stamp duty in question is inconsistent with the full and unfettered use of the power conferred by the Constitution and embodied in the *Property for Public Purposes Acquisition Act* 1901, and that the *Stamp Duties Act* 1898, in so far as it purports to authorize the imposition of the tax, must be held to be void. I agree that judgment must be entered for the Commonwealth.

*Judgment for the plaintiff.*

(1) 1 C.L.R., 91.

Solicitor, for the plaintiff, *The Crown Solicitor for the Commonwealth.*

Solicitor, for the defendant, *The Crown Solicitor for New South Wales.*

C. A. W.

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[HIGH COURT OF AUSTRALIA.]

## MILLARD *v.* THE KING.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 27.

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

*Practice—Special leave to appeal in criminal cases—Point not taken below.*

The High Court will not grant special leave to appeal in a criminal case unless some point of great general importance is involved, which, if wrongly decided, might seriously interfere with the administration of criminal justice.

Special leave to appeal in a criminal case on a point that was not taken by the prisoner's advocate at the trial, and was neither reserved by the presiding Judge for the consideration of the Supreme Court, nor argued by counsel before that Court, was refused.

Special leave to appeal to the High Court from the decision of the Supreme Court; *Rex* v. *Millard*, 23 N.S.W. W.N., 8, refused.

MOTION for special leave to appeal.

The prisoner was convicted, under sec. 125 of the *Crimes Act* 1900, of larceny as a bailee of £5 entrusted to him for the purpose of being paid over to the Advances to Settlers Board in Sydney. Certain points were taken by the prisoner's advocate at the trial, but were over-ruled by the presiding Judge, who, however, reserved them for the consideration of the Supreme Court, and stated a case under sec. 470 of the *Crimes Act*. The question for the