[HIGH COURT OF AUSTRALIA.]

BAXTER . . . . . COMPLAINANT;

AND

AH WAY . . . . . DEFENDANT.

H. C. OF A. 1909.

SYDNEY, *May* 19, 20.

Griffith C.J., O'Connor, Isaacs and Higgins JJ.

Customs Act 1901 (*No.* 6 *of* 1901), *secs.* 52, *sub-sec.* (*g*), 53, 56—*Prohibited imports — Prohibition by proclamation — Conditional legislation — Powers of Commonwealth Parliament—Delegation of legislative power—The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 51, *sub-secs. i., ii.*

Sec. 52, sub-sec. (*g*), of the *Customs Act* 1901, which provides that all goods the importation of which shall be prohibited by proclamation shall be prohibited imports, is not a delegation of legislative power, but conditional legislation, and is within the power conferred on Parliament by sec. 51, sub-secs. i., ii., of the Constitution. The prohibition of importation is a legislative act of the Parliament itself, the effect of sub-sec. (*g*) being to confer upon the Governor-General in Council the discretion to determine, subject to sec. 56 of the Act, to which class of goods other than those specified in the section, and under what conditions, the prohibition shall apply.

Reg. v. *Burah*, 3 App. Cas., 889, applied.

The express prohibition in sec. 53 of the importation of opium, except under certain conditions, does not by implication exclude that article from the operation of sec. 52, sub-sec. (*g*), and sec. 56.

Held, therefore, that a proclamation by the Governor-General in Council, prohibiting the importation into the Commonwealth of opium suitable for smoking, was valid.

QUESTION of law submitted by *Higgins* J. for the opinion of the Full Court in pursuance of Order XXIX. of the Rules of the High Court.

This was originally a prosecution before a Court of summary jurisdiction, under sec. 245 of the *Customs Act* 1901, for an

offence against secs. 50 and 52, sub-sec. (*g*) of the Act, viz., importing prohibited imports, *i.e.* opium suitable for smoking. The defendant elected under sec. 246 of the Act to have the case tried either in the Supreme Court of the State or the High Court, at the option of the prosecutor, who exercised his option in favour of having the case tried by the High Court. The case came on for hearing before *Higgins* J., and the prosecutor, in order to prove that opium suitable for smoking was a prohibited import, tendered in evidence the *Commonwealth Gazette* containing a proclamation by the Governor-General in Council of 29th December 1905 under sec. 52, sub-sec. (*g*), declaring opium in that condition to be a prohibited import. Objection was taken on behalf of the defendant that the proclamation was invalid, so far as it prohibited the importation of opium suitable for smoking, on the ground that sub-sec. (*g*) of sec. 52 was not within the powers of the Commonwealth Parliament. His Honor reserved for the consideration of the Full Court the following question: Whether the proclamation of 29th December 1905, which was published in the *Commonwealth Gazette* of 30th December 1905, was valid so far as it prohibited the importation of opium suitable for smoking, and, subject to the reservation of that question, found that the defendant did unlawfully import opium as alleged in the information.

The matter now came before the Full Court for argument.

Wise K.C. (*Blacket* and *Bavin* with him), for the complainant. The proclamation is valid. It is not legislation by the Governor-General. If it is an exercise of legislative power it is an exercise of that power by Parliament itself. If not a direct exercise of legislative power by Parliament it is at any rate an indirect exercise of that power; the act of legislation is the passing of the *Customs Act*, and the proclamation is the exercise of a power by the subordinate authority appointed by Parliament for carrying the Act into effect. Parliament has power to confer such authority upon any person or body fitted to exercise it. It cannot confer a power to legislate independently, but the power conferred may be quasi-legislative in that its exercise is necessary in order to give effect to the legislative act of the Parliament in

H. C. OF A. 1909.

BAXTER v. AH WAY.

a particular direction. Sub-sec. (9) of sec. 52 merely confers upon the Governor-General a discretion to determine to what goods, other than those already mentioned, and under what conditions, the prohibition of importation shall apply. It goes no further than the legislation discussed in *Reg.* v. *Burah* (1); *Hodge* v. *The Queen* (2); *Powell* v. *Apollo Candle Co. Ltd.* (3), which was held *intra vires*. The powers of the Parliaments which passed the Acts were practically identical in this respect with those of the Commonwealth Parliament. In each case a subordinate authority was vested with powers of the kind now in question. The maxim *delegatus non delegare potest* does not apply. There is no delegation of legislative power, and Parliament is not a delegate of the Imperial Parliament: See *Reg.* v. *Burah* (1). In the United States the Congress, though it has been held to be a mere delegate of the people, has been held to have power to confer such power as this on subordinate authorities: *Field* v. *Clark* (4).

Again: the proclamation is merely an executive act. It is not a law in itself, and has no sanction. Parliament makes the law, and the proclamation merely announces an executive act bringing a particular thing within the operation of the law. [He referred to *United States* v. *Breen* (5); *Lefroy, Legislative Power in Canada*, p. 696.]

[ISAACS J. referred to *Customs Act* (Qd.) 1873 (37 Vict. No. 1), sec. 42; Imperial Act (39 & 40 Vict. c. 36), sec. 43; *Customs Act* (Vict.) 1890, sec. 57; *Warlike Stores Act* (N.S.W.) (41 Vict. No. 23), sec. 2.]

The power to prohibit the importation of goods is treated by *Blackstone* as part of the Royal prerogative, belonging to the Crown as arbiter of commerce. The *Customs Act* has merely recognized and confirmed that power with reference to prohibited imports.

[GRIFFITH C.J.—But that would not make the importation punishable. The proclamation merely forbids it.]

That tends to show that this was not legislation by the

(1) 3 App. Cas., 889.
(2) 9 App. Cas., 117.
(3) 10 App. Cas., 282.
(4) 143 U.S., 649.
(5) 40 Fed. Rep., 202.

Governor-General. The Act creates offences, and the proclamation prohibits importation subject to the penalty provided by the Act. This was a power which passed to the Commonwealth under the distribution of powers between Commonwealth and State. The Governor-General may exercise the powers that the State Governments formerly exercised by virtue of the prerogative. [He referred to 2 *Blac. Comm.*, Bk. IV., Pt. I., c. 6, p. 505; *Robtelmes* v. *Brenan* (1); *Ah Toy* v. *Musgrove* (2); *Forsyth, Opinions on Constitutional Law* (1718), p. 424.

Lamb and *Garland* (*Flannery* with them), for the defendant. Sec. 52, sub-sec. (*g*), is *ultra vires* the Parliament. It is a delegation of legislative power by Parliament to the Governor-General. Such a delegation is repugnant to sec. 1 of the Constitution, which provides that the legislative power of the Commonwealth shall be vested in a Federal Parliament, consisting of the Sovereign and the two Houses. It is stated by the American Courts, in dealing with the corresponding provision of the American Constitution, that it is an axiom in constitutional law, universally recognized as a principle essential to the integrity and maintenance of the system of Government under the Constitution, that no part of the legislative power can be delegated by the Parliament to any other tribunal or body: *Field* v. *Clark* (3). The Commonwealth has not the power which the State Governments had under their Constitutions to create subordinate bodies with powers of general legislation.

[GRIFFITH C.J.—The words in the New South Wales Constitution are the same in this connection.

O'CONNOR J.—Within the scope of the objects of the Constitution the power is the same.]

There is this difference, that the States, as well as the Provinces of Canada, had full power to alter their Constitution by legislation in the ordinary way: *Lefroy, Legislative Power in Canada*, pp. 698, 699 (*n*); whereas the Commonwealth Parliament has no power to do so except in a certain manner. A delegation of legislative power is in effect an alteration of the Constitution which

(1) 4 C.L.R., 395.
(2) (1891) A.C., 272.
(3) 143 U.S., 649, at p. 697.

H. C. OF A. 1909.

BAXTER v. AH WAY.

vests that power in the Parliament itself. [They referred to the Constitution, sec. 128.] The cases like *Hodge* v. *The Queen* (1); and *Powell* v. *Apollo Candle Co. Ltd.* (2), do not apply. The latter case proceeded on the principle that the legislature of New South Wales had power to delegate its functions and so alter its Constitution, provided that the Act was reserved for the Royal assent (3). It is not contended that the Parliament is a delegate of the Imperial Parliament, and that therefore the maxim *delegatus non delegare potest* applies, but that this particular provision is repugnant to the Constitution. In making the proclamation the Governor-General was exercising legislative functions, imposing a restriction on trade and commerce beyond those contained in the Act.

[GRIFFITH C.J.—You admit that a law may be conditional on the ascertainment of some fact, and that some authority may be appointed to decide the question of fact. A question of expediency may be a question of fact. Does not the section merely prohibit the importation of such goods as the Governor-General in Council thinks it expedient to exclude ?]

There is no question of fact left to be decided by him. There is no principle of prohibition indicated at all. It is left to him absolutely to say what goods shall be excluded, not merely to ascertain whether goods come within some rule upon which he is directed to act. In *Field* v. *Clark* (4) the authority was appointed to ascertain some fact. Parliament might have given the Governor-General power to ascertain whether the importation of goods is injurious or inexpedient on any ground, and to proclaim such goods as in his opinion come within that class. But it has not done so. It has given him unlimited power to legislate on the question what shall be prohibited imports. If the Governor-General has the power contended for, the whole of the other sub-sections are unnecessary.

[ISAACS J.—Do not the rest of the sub-sections indicate the kind of goods to be prohibited, *i.e.*, goods injurious to the community, leaving it to the Executive to bring within the prohibition any goods which may in the future turn out to be injurious ?

(1) 9 App. Cas., 117.
(2) 10 App. Cas., 282.
(3) 10 App. Cas., 282, at pp. 287, 289.
(4) 143 U.S., 649.

He referred to *Buttfield* v. *Stranahan* (1); *Union Bridge Co.* v. *United States* (2).]

There is nothing in the words of the sub-section to make it apply only to things *ejusdem generis*.

This power cannot be based upon royal prerogative. The Crown had no power to restrict importation at common law. *Blackstone* in dealing with "Ports and Havens," which are by feudal law under the royal prerogative, says that the power to prohibit by proclamation is vested in the King by Act of Parliament: *Blac. Comm.*

Superintendence of commerce is not assigned to the Crown by common law; freedom of trade is above interference by the prerogative, except in the case of alien goods: *Chitty Prerog.*, p. 162. If there were such power in the Crown, Customs Acts would be rendered useless.

[GRIFFITH C.J.—A Statute in *Chitty's* collection of Statutes provides that the sea shall be absolutely open. That may be part of the common law excluding general control by prerogative.

O'CONNOR J.—The authorities are strong to show that except in time of war the King's prerogative does not extend to interference in trade and commerce.]

On another ground the proclamation is invalid. It purports to deal with goods specifically dealt with in sec. 53. That section prescribes the conditions on importation of opium; it must therefore be assumed that that was intended to exclude any power under sec. 52 to deal with the same goods on a different principle. Sec. 52 should be construed as not applying to goods expressly dealt with in the Act. Whatever may be the effect of sub-sec. (*g*), it did not authorize the imposition of any further restrictions on the importation of opium. [They referred to *Colquhoun* v. *Brooks* (3).]

Counsel for the complainant was not called upon in reply.

Cur. adv. vult.

(1) 192 U.S., 470.
(2) 204 U.S., 364, at p. 385.
(3) 14 App. Cas., 493, at p. 506.

H. C. OF A. 1909.

BAXTER v. AH WAY.

May 20th.

GRIFFITH C.J. The point submitted for the opinion of the Court in this case is whether a proclamation by the Governor-General in Council of 29th December 1905, which prohibited the importation of opium suitable for smoking, is valid. Sec. 50 of the *Customs Act* provides that no prohibited imports shall be imported. Sec. 52 states what are prohibited imports; they are enumerated in a series of sub-sections, of which sub-sec. (*g*) is as follows: "all goods the importation of which may be prohibited by proclamation." Sec. 56 provides that "the power of prohibiting importation of goods shall authorize prohibition subject to any specified condition or restriction and goods imported contrary to any such condition or restriction shall be prohibited imports." The prohibition in this case is of opium suitable for smoking, that is, opium in a particular form or condition. The objection is now taken that this power to prohibit the importation of opium is a power that must be exercised by the legislature directly, and cannot be delegated to the Governor-General in Council. The foundation of the argument that this power cannot be delegated by the legislature is to be found in the case of *Reg.* v. *Burah* (1). It was suggested that the legislature in India was a delegate of the Imperial Parliament, and that the maxim *delegatus non delegare potest* applied to such a Parliament. That contention was scouted by the Privy Council although it had been accepted by a majority of the High Court of Calcutta. It is of course obvious that every legislature does in one sense delegate some of its functions. It is too late in the day to say that the legislature cannot create, for instance, a municipal authority and give it power to make by-laws, or create a public authority with power to make regulations that shall have the force of law, or confer upon the Governor in Council power to make regulations having the force of law, or upon the Judges of the Court power to make Rules of Court having the force of law. Nor is it to the purpose to say that the legislature could have done the thing itself. Of course it could. In one sense this is a delegation of authority because it authorizes another body which it specifies to do something that it might have done itself. It is too late in the

(1) 3 App. Cas., 889.

day to contend that such a delegation, if it is a delegation, is objectionable in any sense. The objection certainly cannot be supported by relying on the maxim *delegatus non delegare potest*, nor, in my opinion, on any other ground. This was pointed out by *Marshall* C.J. in 1825, and no doubt has ever been cast upon his opinion in the United States since, although it has been decided that Congress is to be regarded as a mere delegate of the people. In truth the whole question in this case was disposed of by the Privy Council in *Reg.* v. *Burah* (1). In that case the legislature having authority to pass laws on the subject had provided that certain special laws, which had the effect of excluding the jurisdiction of the High Court, should apply to certain districts specified, and to certain other districts if and when the Lieutenant Governor by notification in the *Calcutta Gazette* should declare that it should so apply. The question was whether it was within the legislative power of the Council to pass such a law. I will read a few passages from the judgment. I remark here that under that Act the Lieutenant Governor was authorized to fix both the time and the place. Lord *Selborne* in delivering the opinion of the Judicial Committee (2) pointed out that it was left to the Lieutenant Governor to determine both whether the law should apply and if so when, and added: "Legislation which does not directly fix the period for its own commencement, but leaves that to be done by an external authority, may with quite as much reason be called incomplete, as that which does not itself immediately determine the whole area to which it is to be applied, but leaves this to be done by the same external authority. If it is an act of legislation on the part of the external authority so trusted to enlarge the area within which a law actually in operation is to be applied, it would seem *à fortiori* to be an act of legislation to bring the law originally into operation by fixing the time for its commencement." So far as I know it has never been doubted that that is a power that may be conferred by the legislature upon the Governor in Council or upon the Government of the State. It is in fact a power continually exercised, and it has never occurred to anybody to dispute it. Then his Lordship, after pointing out that the whole

(1) 3 App. Cas., 889.

(2) 3 App. Cas., 889, at p. 904.

H. C. OF A. 1909.

BAXTER v. AH WAY.

Griffith C.J.

argument proceeded upon the erroneous opinion that a legislature of that kind is a delegate of the Imperial Parliament, went on to say (1): "Their Lordships think that it is a fallacy to speak of the powers thus conferred upon the Lieutenant Governor (large as they undoubtedly are) as if, when they were exercised, the efficacy of the acts done under them would be due to any other legislative authority than that of the Governor-General in Council. Their whole operation is, directly and immediately, under and by virtue of this Act (XXII. of 1869) itself. The proper legislature has exercised its judgment as to place, person, laws, powers; and the result of that judgment has been to legislate conditionally as to all these things. The conditions having been fulfilled, the legislation is now absolute. Where plenary powers of legislation exist as to particular subjects, whether in an imperial or in a provincial legislature, they may (in their Lordships' judgment) be well exercised, either absolutely or conditionally. Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the legislature to persons in whom it places confidence, is no uncommon thing; and, in many circumstances, it may be highly convenient. The British Statute Book abounds with examples of it: and it cannot be supposed that the Imperial Parliament did not, when constituting the Indian legislature, contemplate this kind of conditional legislation as within the scope of the legislative powers which it from time to time conferred." The same observations apply exactly to a law of the Commonwealth or of a State under its Constitution. It is suggested that the words of the first section of the Constitution, which provides that the legislative power of the Commonwealth shall be vested in a Federal Parliament, make a difference. But that section is merely introductory to the provisions of the Constitution which deal with the legislature. Then come other provisions dealing with the executive power, followed by another series dealing with the judical power. The actual powers of the Parliament are conferred by sec. 51, and in their ambit they are unlimited.

There being then no objection to a conditional law being passed, this is a case of that sort. It is not necessary to express

(1) 3 App. Cas., 889, at p. 906.

an opinion as to whether the power to impose a Customs tariff could be delegated by the legislature. But the legislature can say that certain goods shall be prohibited, that any goods which it is not desirable to admit into the Commonwealth shall not be imported. And unless the legislature is prepared to lay down at once and for all time, or for so far into the future as they may think fit, a list of prohibited goods, they must have power to make a prohibition depending upon a condition, and that condition may be the coming into existence or the discovery of some fact. The expediency of admitting particular goods into the Commonwealth at a particular time is a question of fact. Whether it is desirable or reasonable that goods in a certain condition should be excluded is another question of fact. And if that fact is to be the condition upon which the liberty to import the goods is to depend, there must be some means of ascertaining that fact, some person with power to ascertain it; and the Governor in Council is the authority appointed to ascertain and declare the fact. That seems to me to follow directly the language of their Lordships of the Privy Council in *Reg.* v. *Burah* (1). There is another passage in the judgment in that case to which I will call attention, that affords a very weighty argument (2):—"If their Lordships were to adopt the view of the majority of the High Court, they would (unless distinctions were made on grounds beyond the competency of the judicial office) be casting doubt upon the validity of a long course of legislation, appropriate, as far as they can judge, to the peculiar circumstances of India; great part of which belongs to the period antecedent to the year 1861, and must therefore (as *Sir Richard Garth* well observed) be presumed to have been known to, and in the view of, the Imperial Parliament, when the *Councils' Act* of that year was passed." So in this case, if we were to give effect to this objection, we should be casting doubt upon the validity of a long course of legislation in Australia. For in every State before the establishment of the Commonwealth, such powers as this Act purported to confer or recognize in the representative of the Sovereign were frequently conferred by the legislature. Such powers are conferred by the English *Customs Act* of

(1) 3 App. Cas., 889.

(2) 3 App. Cas., 889, at p. 907.

H. C. OF A. 1909.

BAXTER v. AH WAY.

Griffith C.J.

1876, and probably by all previous Customs Acts, and it would not only be throwing doubt upon the validity of those Acts, which have been on the Statute book for so many years, but also would be throwing doubt upon the validity of Statutes that have been in force from the earliest times in New South Wales; as, for instance, the police laws which were made applicable to Sydney and other towns, with power to the Governor in Council to proclaim the extension of the law to other towns as settlement progressed.

On all grounds, therefore, the objection seems to me to be without foundation. The answer to the question submitted must be that the proclamation is valid.

O'CONNOR J. In passing the *Customs Act* 1901 the legislature of the Commonwealth exercised two powers, the power of imposing taxation and the power of regulating trade and commerce with other countries. In so far as the *Customs Act* does not deal with the imposition and collection of duties, it is founded upon the power to regulate trade and commerce with other countries. Under the latter head come the provisions which deal with prohibited imports. Now the scheme of dealing with prohibited imports in the *Customs Act* is this: By sec. 50 the Act directly prohibits the importation of prohibited imports under a penalty. By another section it specifies a number of imports which it declares are prohibited. But in that list it leaves a blank to be filled up by proclamation of the Governor-General in Council, to be filled up as the Governor-General and the Executive Council may think fit in any contingency that may hereafter arise. The Act recognizes the proclamation as part of the scheme of legislation, because in sec. 229 it provides that all goods imported, which are prohibited imports, shall be liable to forfeiture, but excepts goods prohibited by proclamation, if they have been shipped to be imported without knowledge of the proclamation by the shipper, and before the expiration of a reasonable time for the acquisition of the knowledge at the port of shipment. The whole of the law, therefore, which operates in the case of prohibited imports is to be found in the Statute itself except the naming of the article to which these provisions are to

apply. Now it is not denied that Parliament itself might have made a valid law to prohibit the importation of opium, by expressly mentioning that article in the Act. It is not contended that, if the Governor-General in Council had been authorized to prohibit the importation of any article which he deemed to be injurious to the health or well being of the community in any way, and if in the exercise of that discretion he had prohibited the importation of opium, there could have been any objection to the exercise of that power. But it is said that, because the filling up of the blank, and the naming of the article in each contingency that may happen in the future, is left to the absolute discretion of the Governor-General in Council, that is an attempt to exercise a power which is not conferred upon the legislature by the Constitution. And that is the narrow point which we have to decide. Now the powers of legislation conferred in respect of this particular matter are contained in sec. 51 of the Constitution, and those powers are conferred in a form of words which has been universally adopted by the British Parliament in conferring powers of legislation upon its self-governing communities. The power, so far as my research has enabled me to discover, has always been conferred in the same words:—"power to make laws for the peace, order, and good government." The power of legislation is given in that form in sec. 51 with respect to trade and commerce with other countries, and with respect to taxation. And there is also a power to make laws incidental to the exercise of any power vested in Parliament by the Constitution. Within that latter class is sub-sec. (xxxix.) of sec. 51. It is a fundamental principle of the Constitution that everything necessary to the exercise of a power is included in the grant of a power. Everything necessary to the effective exercise of a power of legislation must, therefore, be taken to be conferred by the Constitution with that power. Now the legislature would be an ineffective instrument for making laws if it only dealt with the circumstances existing at the date of the measure. The aim of all legislatures is to project their minds as far as possible into the future, and to provide in terms as general as possible for all contingencies likely to arise in the application of the law. But it is not possible to provide specifically for all cases, and, there-

H. C. OF A. 1909.

BAXTER v. AH WAY.

O'Connor J.

fore, legislation from the very earliest times, and particularly in more modern times, has taken the form of conditional legislation, leaving it to some specified authority to determine the circumstances in which the law shall be applied, or to what its operation shall be extended, or the particular class of persons or goods to which it shall be applied. In the case of *Field* v. *Clark* (1), which was cited to us by Mr. *Lamb* in the course of his argument, there is a passage which has a direct bearing upon this aspect of the power of the legislature. In delivering the judgment of the Court, Mr. Justice *Harlan* said, quoting from another case, *Moers* v. *City of Reading* (2):—"'Half the Statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law. So in *Locke's Appeal* (3), 'To assert that a law is less than a law, because it is made to depend upon a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know.' The proper distinction the Court said was this:—'The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation.'"

Now amongst other illustrations of the application of that method of legislation one is to be found in the English legislation in regard to Customs. In the English *Customs Law Consolidation Act* of 1876, which consolidates in this respect the earlier Statutes, there is a provision (sec. 43) giving precisely the same power to the Government by proclamation or Order in Council to prohibit the importation of goods not specified. The legislature of Victoria

(1) 143 U.S., 649, at p. 694.
(2) 21 Pa. S.R., 188, at p. 202.
(3) 72 Pa. S.R., 491, at p. 498.

has in its Customs law, which was in force at the time when the Commonwealth Constitution came into operation, a precisely similar section. The Queensland *Customs Act* of 1873 is in the same terms. I do not refer to the *Customs Act* of New South Wales because it was more limited in its operation. Therefore, at the time when the power of legislation was conferred upon the Commonwealth Parliament this was a common form in which the power had been exercised in all kinds of legislation: and in regard to Customs legislation there were then actually in existence these illustrations of its exercise that I have mentioned. Not only that, but when the Constitution was enacted and the administration of the Customs of Australia passed into the control of the Commonwealth Parliament, that administration necessarily went on under the State laws, and to provide for continuity of administration sec. 70 of the Constitution provided that all powers under State Acts administered by the Governors of the different States, in respect of matters which passed to the Executive of the Commonwealth by the Constitution, should vest in the Governor-General or the Governor-General in Council. So that this very power which is in question here, to prohibit any goods from being imported, vested in the Executive of the Commonwealth, at all events as far as Victoria and South Australia were concerned, at the passing of the Constitution. Now that brings me to the essence of this objection. It is contended that, so far from the legislature of the Commonwealth having the plenary powers which are undoubtedly conferred upon it within the ambit of its authority, its power is less than that of the States the administration of whose laws had passed to it, and is less than the power exercised by the legislature in England in dealing with the same subject matter. Can it be seriously contended that, in creating a legislature such as that of the Commonwealth with plenary powers, and in giving it power to deal with this particular subject matter, the power is to be denied it which is necessary and essential, and has been always treated as necessary and essential, for the exercise of that legislative power in England and in several of the Australian States. To read the gift of power to the Parliament of the Commonwealth in that limited way would, it seems to me, be altogether to deny full force and effect to the words of the

H. C. OF A. 1909.

BAXTER v. AH WAY.

O'Connor J.

Constitution itself. I think, therefore, that there can be no question whatever that the full powers of legislation which are conferred upon the Commonwealth Parliament to deal with Customs and to deal with trade and commerce between the Commonwealth and other countries embody a power to enact the conditional legislation now in question, which enables the Executive Government, in keeping a watchful eye upon the interests of the Commonwealth and its commerce, to act in the public interest on some sudden emergency which it would have been impossible for any legislature, no matter how great the extent of its prescience, to foresee. Under these circumstances, without referring to the authorities which undoubtedly bear out and support, as my learned brother the Chief Justice has pointed out, the common use of this power of conditional legislation and the sound principle upon which it rests, I content myself with saying that by the Constitution, if its words are to be read in the sense in which they have always been understood, the power to authorize such a proclamation by the Governor-General in Council is clearly conferred upon the Commonwealth.

ISAACS J. read the following judgment:—Two grounds were advanced for impeaching the validity of the proclamation—first, that sub-sec. (*g*) of sec. 52 of the *Customs Act* 1901 is *ultra vires* of the Commonwealth Parliament, and next, that in view of sec. 53 specifically dealing with opium that subject is impliedly excluded from the general provisions of sec. 52.

Now the argument relied on to establish the first ground is that the Constitution vests in the Parliament the legislative power of the Commonwealth, and Parliament can alone exercise it, and that what that body by sub-sec. (*g*) has purported to do is to relinquish in favour of the Governor-General in Council the power of legislating so as to prohibit imports.

In England for a very long period Parliament has legislated in a similar manner. The present English enactment is 39 & 40 Vict. c. 36, sec. 43, which is in these terms:—"The importation of arms, ammunition, gunpowder or *any other goods* may be prohibited by proclamation or Order in Council." That followed the earlier provisions of sec. 45 of 16 & 17 Vict. c. 107. Doubtless

the Imperial Parliament is unfettered in its powers of legislation, but the enactment shows the recognized necessity of such a provision. *Hamel* in his *Laws of the Customs* (p. 106) says :— "This power, though seldom exercised, is a wholesome provision, for defensive as well as sanitary purposes."

Various Colonial Statutes were passed on similar lines, as in the New South Wales *Customs Act* 1879, sec. 32, the Queensland *Customs Regulation Act*, 37 Vict. No. 1, sec. 42, and the Victorian *Customs Act* 1890, sec. 57. These were all passed by legislatures dependent for their powers on written Constitutions. The necessity for such an enactment as a working provision is obvious. Parliament is not able to foresee every circumstance which might render the introduction into Australia of goods from abroad detrimental or even dangerous to the people of the Commonwealth.

The practical necessity for excluding some articles unprovided for in the Act might arise when Parliament was in recess or otherwise unable to meet the emergency in time, and I cannot think that such a manifest safeguard as reason suggests, as long experience had shown to be desirable, and precedent had established, was intentionally omitted from the Australian Constitution. The States before Federation had the power of so authorizing the Crown's representative ; they have now parted with it, and if it is not in the Commonwealth Parliament it must have mysteriously disappeared altogether in the transition. I cannot believe that is the case.

The sub-section referred to empowers the Governor-General to prohibit goods by proclamation, and read with sec. 56 enables him to do so subject to conditions or restrictions. But nothing more. The proclamation stands *per se* as a mere notification to the world that specified goods are prohibited. The proclamation is a mere fact. That fact, however, has certain consequences prescribed by the Parliament itself. Sec. 52 enacts that in that event the goods are "prohibited imports," and sec. 50 declares that no prohibited imports shall be imported under a penalty up to £100. The Governor-General does not legislate, using that word in the true sense. There is no subject handed over to him to legislate upon as he pleases without any substantive provision

H. C. OF A. 1909.

BAXTER v. AH WAY.

Isaacs J.

as to consequences by the Parliament itself. Apart from decisions I should hold the objection untenable. But there is overwhelming authority on the subject.

Hodge v. *The Queen* (1) carries the matter even further than necessary to answer the defendant's contention in this case. That was a much stronger instance of delegation.

The Ontario legislature in dealing with the subject of liquor created a new body, namely, a Board of Licence Commissioners, and empowered them to pass resolutions defining conditions of tavern licences, and to impose penalties for infraction. The Commissioners passed a resolution that *inter alia* licensed persons should not allow any billiard table to be used during the time prohibited by the Act or the resolution for the sale of liquor. They affixed a money penalty, in default distress, and in default of sufficient distress imprisonment with or without hard labour. Hodge was convicted for breach of the provision, and was fined, and was ultimately sent to gaol to be kept there at hard labour for 15 days unless the fine was sooner paid. It was argued, first, that the Parliament itself had no power to legislate as the Commissioners had resolved, but it was held that the legislature had such power if it had itself exercised it. Then it was contended that the principle of *delegatus non delegare potest* applied, and the power could not be delegated. Their Lordships, following *Reg.* v. *Burah* (2), emphatically rejected the suggestion that a colonial legislature is a delegate of the Imperial Parliament, and held that within the limits assigned by the Constitution it has powers of legislation as plenary and ample "as the Imperial Parliament in the plenitude of its power possessed or could bestow." Their Lordships say (3):— "Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation."

(1) 9 App. Cas., 117. (2) 3 App. Cas., 889.
(3) 9 App. Cas., 117, at p. 132.

Further, when it was argued that at all events imprisonment with hard labour was beyond the powers of the Commissioners, it was answered by the Privy Council in this way: The Parliament, on the true construction of the British North America Act, would have had power to so enact; and then their Lordships say:—"The provincial legislature having thus the authority to impose imprisonment, with or without hard labour, had also power to *delegate* similar authority to the municipal body which it created, called the Licence Commissioners."

This is the broad, enlightened manner in which the Privy Council has stated the power of self-governing Colonies under a Constitution granted by the Imperial Parliament, and I, sitting in an Australian Court, see no reason to narrow it.

It was suggested that *Hodge* v. *The Queen* (1) ought to be distinguished because the legislature of the province of Ontario might change its Constitution. But the power of the legislature must depend upon the terms of the Constitution as it exists at the given moment. It is not a sound argument that, because a change might be deliberately made by Parliament in a Constitution, therefore any ordinary Act whatever may be passed, though in contravention of constitutional provisions as they stand. The case of *Cooper* v. *Commissioner of Income Tax* (2), is a clear authority against such a contention.

Powell v. *Apollo Candle Co.* (3) was a case similar in principle to *Hodge* v. *The Queen* (1), and arising under the Constitution of New South Wales. The argument as to delegation advanced in the present case was the basis of the decision of the Supreme Court. An actual duty was by Order in Council directed to be levied in pursuance of a power conferred by Act of Parliament. *Sir Robert Collier* for the Privy Council, referring to *Hodge* v. *The Queen* (1), and *Reg.* v. *Burah* (4), said (5), as it appears somewhat optimistically, that those two cases had put an end to a doctrine which appeared at one time to have had currency that a colonial legislature is a delegate of the Imperial legislature. He re-affirmed the position that it is a legislature

(1) 9 App. Cas., 117.
(2) 4 C.L.R., 1304.
(3) 10 App. Cas., 282.
(4) 3 App. Cas., 889.
(5) 10 App. Cas., 282, at p. 289.

H. C. OF A. 1909.

BAXTER v. AH WAY.

Isaacs J.

restricted in the area of its powers, but within that area unrestricted, and not acting as an agent or delegate.

He pointed out that the powers of legislation under sec. 45 of the Constitution were subject to the limitations mentioned in that and the preceding section; an observation which is in entire opposition and a complete answer to the suggestion that, because there is power of altering the Constitution, therefore any casual Act in conflict with it is an effectual alteration of the fundamental instrument. These limitations, it was pointed out, had not been transgressed. He then proceeded to say that the duties levied under the Order in Council are really levied by the authority of the Act under which the Order is issued, and that the legislature still retained full control over the subject.

This is an exact statement of the position in the present instance. As well on the authority of the cases mentioned as on the evident principle involved, I am of opinion the first ground of objection cannot be sustained.

With reference to the second ground: sec. 53 does no more than make one special statutory condition in respect of the enumerated goods. It is couched in negative words, and its natural and primary meaning is not an exhaustive enactment with regard to those goods or an affirmative permission to enter on compliance with the single condition required by that section, but a requirement that must be complied with upon an entry otherwise lawful.

If the goods mentioned in sec. 53 were to be regarded as excluded from sec. 52, it would lead to extraordinary results. For instance, sub-sec. (*d*) excluding prison made goods, and sub-sec. (*h*) prohibiting goods fraudulently marked, would be useless in respect of any of the enumerated articles, and it is beyond all reasonable belief to imagine that such was the intent of the legislature. But if the argument fails as to those sub-sections it cannot hold with regard to sub-sec. (*g*).

I therefore concur in the judgment proposed.

HIGGINS J. read the following judgment:—The decision of the point reserved must ultimately turn on the construction of sec. 51 of the Constitution, and on secs. 50-57 of the *Customs*

Act 1901. What does sec. 51 (1) of the Constitution enable the Federal Parliament to do? What has that Parliament done under sec. 52 of the *Customs Act*? The Parliament has power to make laws—that is to say, any kind of laws—for the peace, order, and good government of the Commonwealth with respect to (*inter alia*) trade and commerce with other countries. As under this power, the Parliament has enacted that no prohibited imports shall be imported (sec. 50). The meaning of the word "prohibited" is defined by sec. 52. It is sec. 50, not sec. 52, which forbids the importation of goods which are in the list of goods called "prohibited." It is true that sec. 52 (*g*) uses the words "prohibited by proclamation," as if it were the proclamation that excluded the goods. But if we consider sec. 50—"No prohibited goods shall be imported"—it is clear that in substance it is the Parliament that excludes such goods as are mentioned in the proclamation. Sec. 52 is essentially a defining section—"The following are prohibited imports"; and amongst other goods which are to be in the list of "prohibited" imports are (*g*) "all goods the importation of which may be prohibited by proclamation" (that is, proclamation by the Governor-General in Council). If Parliament had said that all goods excluded from entrance into Great Britain by British law, from time to time, are to come within the definition of "prohibited imports" for the purpose of sec. 50 of an Australian *Customs Act*, there surely could be no doubt that the provision would be valid. Mr. *Lamb*, indeed, admits it. Then why should not a provision be valid to the effect that all goods named, from time to time, on a black list to be kept by the Governor-General, shall be prohibited imports, shall not be imported? True, the British Parliament exercises its own judgment, its own discretion in making the law for Great Britain; but that fact does not involve the result that it is the British Parliament that makes the law for Australia. Nor in this case is it the Governor-General that has made the law for Australia. The operative will in the making of the law, as regards Australia, is the will of the Australian Parliament. The prohibition comes into operation by the will of the Australian Parliament, and ceases to operate as soon as the Australian Parliament so determines. It is the will of that Parliament that

H. C. OF A. 1909.

BAXTER v. AH WAY.

Isaacs J.

the prohibition shall apply to such goods as the Governor-General in Council in his discretion shall determine. So long as that Parliament leaves the *Customs Act* unaltered, the prohibition applies to any class of goods mentioned in a certain public proclamation to that end. I base my reasoning on what I conceive to be the strict principles of dry statutory construction, regardless, for the nonce, of the disastrous confusion and embarrassment into which a contrary judgment would plunge the federated people. But it has to be remembered, even in accordance with those strict principles, that at the time of the adoption of the Constitution by the British Parliament, the word "law" included in England and in the Colonies legislation such as the present enabling functionaries or bodies other than Parliament itself to say under what circumstances, and to whom, and in respect of what things a given course of action is applicable; and there is no ground for treating a law of this kind as excepted from the powers given by sec. 51 of the Constitution. The only difficulty arises when it is attempted to apply the principle of *delegatus non delegare potest*—a principle which is so familiar to lawyers in connection with agents and trustees. But, according to my view, there is not here in fact any delegation of the law-making power; and besides, as I understand the cases of *Reg.* v. *Burah* (1) and the other cases following it before the Privy Council, that principle is not applicable to the case of the numerous subordinate Parliaments created by the British Parliament, whether they have power in themselves to alter their own Constitutions or not. Analogies are dangerous; but if I may, for the present purpose, venture on one, I should say that within the ambit of the subjects committed to it, the Federal Parliament, and that within the ambit of the subjects committed to them, the State Parliaments, are like general agents, not like special agents; and that the Federal Parliament has, within its ambit, full power to frame its laws in any fashion, using any agent, any agency, any machinery that in its wisdom it thinks fit, for the peace, order, and good government of Australia.

Question submitted answered in the affirmative.

(1) 3 App. Cas., 889.

Wise K.C. asked for costs. Sec. 26 of the *Judiciary Act* does not seem to give the Judge power to award costs.

[Griffith C.J.—The Justice is the High Court in this case. The reference is under sec. 18 of the Act. There is no particular rule. Sometimes this Court makes an order as to costs and sometimes it does not.]

Lamb, for the defendant, referred to *Merchant Service Guild of Australasia* v. *Archibald Currie & Co. Prop. Ltd.* (1).

[ISAACS J.—There the Judge referred the matter of his own motion.

HIGGINS J.—The point was taken by the defendant in this case and I did not agree with it. But counsel satisfied me that there was reasonable ground for submitting the question. This is really a sort of side proceeding in the trial.

GRIFFITH C.J.—I do not see that it differs in any way from a demurrer to a pleading where the demurrer is ordered to be heard first.]

The question of costs was referred to *Higgins* J. with the opinion of the Court on the question submitted.

Solicitor, for the complainant, *Charles Powers*, Crown Solicitor for the Commonwealth.

Solicitor, for the defendant, *J. J. Carroll.*

C. A. W.

(1) 5 C.L.R., 737.