I can find no discrimination between States or parts of States. I concur in the opinion that this action should be dismissed, and with costs.

H. C. OF A. 1911.

OSBORNE v. THE COMMONWEALTH.

Higgins J.

Judgment for the defendants, with costs.

Solicitors, for the plaintiff, *Norton Smith & Co.*

Solicitor, for the defendants, *C. Powers*, Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

CHAPLIN . . . . . APPELLANT;
DEFENDANT,

AND

COMMISSIONER OF TAXES FOR SOUTH AUSTRALIA . . . . . } RESPONDENT,
PLAINTIFF,

ON APPEAL FROM THE LOCAL COURT OF ADELAIDE.

H. C. OF A. 1911.

ADELAIDE, *May* 18.

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

Legislative powers of States—Taxation of salary of Commonwealth officer—Grant by Commonwealth Parliament to State of authority to tax—Commonwealth Salaries Act 1907 (*No.* 7 *of* 1907), *sec.* 2.

The Commonwealth Parliament may make its grants of salaries to Commonwealth officers subject to taxation by the States.

The *Commonwealth Salaries Act* 1907 is an effective grant to the States of authority to impose upon Commonwealth officers taxation in respect of their salaries, subject to the conditions stated in that Act.

APPEAL by way of special case.

H. C. OF A 1911.

CHAPLIN v. COMMISSIONER OF TAXES FOR SOUTH AUSTRALIA.

Frederick William Chaplin, the appellant, a telegraph operator, employed in the Department of the Postmaster-General, and as such resident in South Australia, did not furnish to the Commissioner of Taxes for South Australia, the respondent, an income tax return for the year 1908 pursuant to the *Taxation Act* 1884. The respondent, under sec. 67 of the Act, made an assessment of income tax which, in his judgment, ought to have been charged by virtue of the Act, and thereupon forthwith gave notice thereof to the appellant, who did not appeal against such assessment under sec. 47 of the Act, and who did not pay the amount of the assessment. On 12th April 1910 the respondent brought an action in the Local Court of Adelaide to recover from the appellant the sum of £1 13s. 6d., being moneys alleged to be payable for income tax under such assessment.

At the hearing, the material facts being admitted, it was contended for the respondent that, as Chaplin had failed to appeal as before mentioned, the assessment was conclusive and binding upon him. For the appellant it was contended that his income being the official salary of an officer of the Commonwealth was exempt from taxation under the Act, that the principle of *D'Emden* v. *Pedder* (1) was applicable, and that the *Commonwealth Salaries Act* 1907 was invalid and inoperative. The Court gave judgment for the respondent, and stated a special case to the Supreme Court, setting out the foregoing facts and asking the following questions :—

1. Is the said assessment conclusive and binding on the appellant he having failed to appeal against the same ?
2. If question 1 be answered in the negative, then
   (*a*) Is the appellant's official salary as an officer of the Commonwealth of Australia exempt from taxation under the *Taxation Act* 1907 ?
   (*b*) Does the principle of *D'Emden* v. *Pedder* (1) apply ?
   (*c*) Is the *Commonwealth Salaries Act* 1907 invalid and inoperative in so far as it relates to the taxation of the salaries of officers of the Commonwealth ?

The special case was transmitted to the High Court pursuant to sec. 40A of the *Judiciary Act* 1903-1907.

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

Nesbit K.C. (*H. K. Paine* with him), for the appellant. Assuming that the Commonwealth Parliament has power to give authority to the States to tax the salaries of Commonwealth officers (see *Baxter* v. *Commissioners of Taxation, New South Wales* (1); doubted by *Higgins* J. in *Flint* v. *Webb* (2)), the Parliament has effectively given that authority by the *Commonwealth Salaries Act* 1907. Sec. 2 of that Act enacts that what this Court has said is the law shall not be the law, viz., that taxation of salaries of Commonwealth officers is not to be deemed to be an interference with the exercise of any power of the Commonwealth. Although the Privy Council in *Commissioners of Taxation, New South Wales* v. *Baxter* (3) treated this Act as authorizing taxation by the States, their attention was not drawn to this point. The Act does not show an intention to renounce the rights of the Commonwealth. [He referred also to *Harrison Moore's Constitution of the Commonwealth of Australia*, 2nd ed., p. 427.]

[GRIFFITH C.J. referred to *California* v. *Central Pacific Railroad Co.* (4)].

E. E. Cleland, for the respondent. It is not that the taxation of a federal officer is unconstitutional, but that the attempt to interfere with the exercise of the Commonwealth powers makes the taxation unconstitutional. That being so, directly the reason underlying the principle goes, the taxation ceases to be an interference, and, directly there is a consent in any form by the Parliament, the taxation ceases to be an interference. The statement of the principle of *D'Emden* v. *Pedder* (5) carries with it the authority of the Commonwealth Parliament to say that a particular act shall not be an interference.

[O'CONNOR J.—If the privilege were that of the individual I do not think the Commonwealth Parliament could give it up, but it is the privilege of the Commonwealth, which alone can complain of the interference and may therefore consent to it].

This Act is a direct exercise of the power conferred upon the Parliament, and the Parliament has used the most apt words

(1) 4 C.L.R., 1087, at p. 1133.
(2) 4 C.L.R., 1178, at p. 1194.
(3) 5 C.L.R., 398; (1908) A.C., 214.
(4) 127 U.S., 1, at p. 41.
(5) 1 C.L.R.., 91.

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because they do away with the facts which make the principle applicable. [He referred to *Van Allen* v. *Assessors* (1).]

[GRIFFITH C.J. referred to *National Bank* v. *Commonwealth* (2); *People* v. *Commissioners* (3)].

Nesbit K.C., in reply.

GRIFFITH C.J. This is an appeal transmitted to the High Court under the *Judiciary Act* 1903-1907 raising the question whether the *Commonwealth Salaries Act* 1907 is valid. The appellant is an officer of the Commonwealth residing in South Australia who has been assessed for income tax, and the question raised is whether he is liable or not.

This Court held in the case of *Baxter* v. *Commissioners of Taxation, New South Wales* (4) that officers of the Commonwealth were not liable to such tax in respect of their salaries for reasons to which it is not necessary to refer at length. But in the course of the judgment in that case, speaking for myself and my brothers *Barton* and *O'Connor*, I said (5):— "The question whether a State tax upon the emoluments of federal officers is within the prohibition is a minor question, for the federal Parliament can make its grants subject to such a tax. *Quilibet potest renunciare juri pro se introducto.*" In *D'Emden* v. *Pedder* (6), the Court did not apply their minds to the question whether the federal Parliament could or could not renounce the claim to the privilege asserted in that case. But the doctrine laid down by this Court was admittedly based upon that laid down by the Supreme Court of the United States in the great case of *M'Culloch* v. *Maryland* (7). That principle, however, has always been understood in the United States to be subject to qualification. In *Cooley's Constitutional Limitations*, 7th ed., at p. 682, a book which is recognized as of considerable authority, it is said :—"It follows as a logical result from this doctrine that if the Congress of the Union may constitutionally create a Bank of the United States, as an agency of the national govern-

(1) 3 Wall., 573, at p. 584.
(2) 9 Wall., 353, at p. 361.
(3) 4 Wall., 244.
(4) 4 C.L.R., 1087.
(5) 4 C.L.R., 1087, at p. 1133.
(6) 1 C.L.R., 91.
(7) 4 Wheat., 316.

ment in the accomplishment of its constitutional purposes, any power of the States to tax such bank, or its property, or the means of performing its functions, unless with the consent of the United States, is precluded by necessary implication."

In the case of *California* v. *Central Pacific Railroad Co.* (1) the question was as to the taxation of a franchise granted by the United States Congress, and, after discussing the general nature of franchises, the Court went on to say:—"In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a State without the consent of Congress?" In an earlier case, *National Bank* v. *Commonwealth* (2) the Court said:—"But it is argued that the banks, being instrumentalities of the Federal Government, by which some of its important operations are conducted, cannot be subjected to such State legislation. It is certainly true that the Bank of the United States and its capital were held to be exempt from State taxation on the ground here stated, and this principle, laid down in the case of *M'Culloch* v. *Maryland* (3), has been repeatedly affirmed by the Court. But the doctrine has its foundation in the proposition, that the right of taxation may be so used in such cases as to destroy the instrumentalities by which the Government proposes to effect its lawful purposes in the States, and it certainly cannot be maintained that banks or other corporations or instrumentalities of the Government are to be wholly withdrawn from the operation of State legislation. The most important agents of the Federal Government are its officers, but no one will contend that when a man becomes an officer of the Government he ceases to be subject to the laws of the State. The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the Federal Government are only exempted from State legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that Government. Any other rule would convert a principle founded alone in the necessity of

(1) 127 U.S., 1, at p. 41.
(2) 9 Wall., 353, at p. 361.
(3) 4 Wheat., 316.

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Griffith C.J.

securing to the Government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States." In the case of *Thomson* v. *Pacific Railroad* (1) the Court said:—"There are other instances in which exemption, to the extent it is established in *M'Culloch* v. *Maryland* (2), might have been held to arise from the simple creation and organization of corporations under Acts of Congress, as in the case of the National Banking Associations; but in which Congress thought fit to prescribe the extent to which State taxation may be applied." Reference was there made to, amongst others, the case of *Van Allen* v. *Assessors* (3). In that case (4) a form of a Statute passed by Congress is given in these terms:—"That nothing in this Act shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate, from being included in the valuation of personal property of such person or corporation in the assessment of taxes imposed by or under State authority, at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State."

What I have said shows how the doctrine is regarded in the United States and how it is applied. In *Van Allen* v. *Assessors* (3) the Supreme Court held that the State of New York, which imposed the tax, had not kept within the limits allowed by the Act of Congress. The privilege is a privilege of the Federal Government that its instrumentalities may be unimpeded. If it grant a salary for the performance of duties, that is the same in principle as the grant of a franchise to an individual or to a company. The grant, if no more is said, is free from taxation by the State, but in making the grant the Commonwealth may say that the grant to the individual is subject to State taxation. It is then impossible to say there is any interference with the free exercise of the federal power. It is unimportant in what form the right to a limited interference is granted. Provided that it is granted, it cannot be asserted with truth that there is any interference with the free exercise of the powers of the Com-

(1) 9 Wall., 579, at p. 589.
(2) 4 Wheat., 316.
(3) 3 Wall., 573.
(4) 3 Wall., 573, at p. 584.

monwealth. These being the doctrines which I conceive have application to this case, the only question is whether the Act passed by the Federal Parliament gives effect to them. The terms of the Act that are material are these:—"The taxation by a State, in common with other salaries earned within the State, of—

(*a*) the official salaries of officers of the Commonwealth residing in the State earned in the State . . . .

shall not, if the taxation is not a higher rate or to a greater extent than is imposed on other salaries of the same amount earned in the State, be deemed—

(*c*) to be an interference with the exercise of any power of the Commonwealth," &c.

That is, in substance, saying that the grant of a salary to an officer of the Commonwealth is made on condition that he is subject to a law of the State as to taxation to the same extent as any other citizen, and is a solemn declaration that such taxation is not an interference with the exercise of the powers of the Commonwealth. The limitation, it is to be observed, is the same as that in the Act of Congress which was in question in *Van Allen* v. *Assessors* (1). If the State Parliament were to impose upon salaries of Commonwealth officers an income tax higher than that on other salaries of the same amounts, then the doctrine of *Baxter* v. *Commissioners of Taxation, New South Wales* (2) would come in, and the Act would be so far void.

For these reasons I think that what we said in *Baxter* v. *Commissioner of Taxes, New South Wales* (3), whether regarded as a *dictum* or not, is sound law and part of the law of the Commonwealth.

Our opinion upon this question disposes of the whole case, because, if the appellant is not exempt from taxation, the question whether the assessment is conclusive and binding on him, he not having appealed against it, does not arise. It is unnecessary, therefore, to send the case back to the Supreme Court, and the appeal will be dismissed.

(1) 3 Wall., 573.

(2) 4 C.L.R., 1087.

(3) 4 C.L.R., 1087, at p. 1133.

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BARTON J. I concur.

O'CONNOR J. I concur.

Appeal dismissed with costs.

Solicitor, for the appellant, *H. K. Paine.*

Solicitor, for the respondent, *C. J. Dashwood,* Crown Solicitor for South Australia.

B. L.

[HIGH COURT OF AUSTRALIA.]

ARMSTRONG . . . . . APPEALLANT;
PLAINTIFF,

AND

THE GREAT SOUTHERN GOLD MINING COMPANY, NO LIABILITY . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Discd *Madden, Re* (1996) 131 FLR 430

H. C. OF A. 1911.

MELBOURNE, *June* 15, 16, 19.

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

Practice—County Court—New trial—Service of notice of application—Time—"Clear days"—Enlarging time—Appeal from exercise of discretion—Misdirection—No objection at trial—County Court Act 1890 (*Vict.*), (*No.* 1078), *sec.* 96—*County Court Rules* 1891 (*Vict.*), *Interpretation clause, rr.* 188, 424, 426.

The interpretation clause of the County Court Rules 1891 (Vict.) provides that "if not inconsistent with the context or subject matter . . . 'clear days' shall mean that in all cases in which any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusive both of the first and of the last day." R. 188 provides that "an application for a new trial . . . may be made either to the Court or a Judge . . . ; if application be not made at the trial notice in writing, setting out the grounds thereof, must be left with the Registrar . . . and a copy of such notice must be served upon the opposite party . . . within seven clear days after the day of trial."