[HIGH COURT OF AUSTRALIA.]

BUCHANAN AND ANOTHER . . . PLAINTIFFS;

AND

THE COMMONWEALTH AND ANOTHER . DEFENDANTS.

H. C. OF A. 1913.

SYDNEY, *April* 10, 11. 14; *May* 9.

Barton A.C.J., Isaacs, Gavan Duffy and Rich JJ.

Constitutional law—Powers of Commonwealth—Legislation as to territory acquired by Commonwealth—Taxation in territory—Taxing Act dealing with other matters or with more than one subject of taxation—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51, 55, 122—*Northern Territory Acceptance Act* 1910 (*No.* 20 *of* 1910), *sec.* 7—*Northern Territory* (*Administration*) *Act* 1910 (*No.* 27 *of* 1910), *sec.* 5—*Administration and Probate Act* 1891 (*S.A.*) (*No.* 537), *sec.* 27—*Succession Duties Act* 1893 (*S.A.*) (*No.* 567), *secs.* 4, 6, *Second Schedule.*

Practice — Parties — Action to recover money demanded by judicial officer of Commonwealth colore officii and paid under protest—Joinder of judicial officer of Commonwealth.

The limitations imposed by sec. 55 of the Constitution upon the making of laws imposing taxation apply only to such laws as are made under the power conferred by sec. 51 (ii.), and do not apply to laws made under the power to make laws for the government of any territory acquired by the Commonwealth conferred by sec. 122, the two powers being independent of one another.

Held, therefore, that the *Northern Territory Acceptance Act* 1910 and the *Northern Territory* (*Administration*) *Act* 1910, so far as by sec. 7 of the former Act and sec. 5 of the latter Act they purport to give effect in the Northern Territory, as laws of the Commonwealth, to laws of South Australia which impose taxation, are valid.

The executors of the will of a deceased person who owned certain property in the Northern Territory applied to the Judge of the Northern Territory to have an exemplified copy of the probate which had been granted in New South Wales re-sealed with the seal of the Northern Territory.

Held, that they were not entitled to have the exemplified copy of the probate so re-sealed except on payment, in respect of the property in the Northern

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Territory, of the succession and probate duties imposed by the *Succession Duties Act* 1893 (S.A.) and the *Administration and Probate Act* 1891 (S.A.).

The Judge of the Northern Territory cannot properly be joined as a defendant in an action against the Commonwealth to recover money alleged to have been wrongfully demanded by him *colore officii*, and to have been paid to the Commonwealth under protest.

CASE STATED.

The case was substantially as follows:—

"1. This is an action brought by William Buchanan and Charles Henry Buchanan, the executors of the will and codicil of William Frederick Buchanan, deceased, against the Commonwealth of Australia and the Honourable David J. D. Bevan, who is the Judge of the Supreme Court of the Northern Territory.

"2. The plaintiffs in this action claim that the defendants be ordered to pay to the plaintiffs the sum of £4,471 4s. 8d., being an amount alleged by the plaintiffs to have been wrongfully demanded from the plaintiffs *colore officii* by the defendant the Honourable David J. D. Bevan, as such Judge as aforesaid, as payable to the defendant Commonwealth, and paid under protest by the plaintiffs to the said defendant the Honourable David J. D. Bevan, servant or agent of the defendant Commonwealth, and by him paid in due course to the defendant Commonwealth.

"3. The above-named William Frederick Buchanan of Narrabri, in the State of New South Wales, grazier, now deceased, at the date of his death hereinafter mentioned, was seised and possessed of, or otherwise well entitled to, real and personal estate of great value in the State of New South Wales and in other States, and was also entitled to certain leasehold properties and other personal estate situated in the Northern Territory.

"4. The said William Frederick Buchanan duly made his will dated 28th February 1910 and one codicil thereto dated 7th October 1910 whereby he appointed the plaintiffs the executors thereof.

"5. The said William Frederick Buchanan died on 2nd May 1911, and probate of his said will and codicil was on 2nd November 1911 duly granted by the Supreme Court of New South Wales in its probate jurisdiction to the plaintiffs, the executors therein named.

"6. In or about the month of February the plaintiffs duly applied to have an exemplified copy of the probate of the said will and codicil so granted in New South Wales as aforesaid re-sealed with the seal of the Northern Territory, and on 4th April last the Honourable S. J. Mitchell, then Judge of the Northern Territory, informed the plaintiffs that the said exemplification had been re-sealed in the Court of the Northern Territory and awaited returns.

"7. On 30th May last the plaintiffs by their solicitor duly requested the defendant the Honourable David J. D. Bevan, who was then and is now the Judge of the Northern Territory, to deliver to the plaintiffs the exemplification of probate so re-sealed as aforesaid, but the said defendant informed the plaintiffs that the said exemplification would be delivered to the plaintiffs on the requirements of certain South Australian Statutes, namely, the *Succession Duties Act* 1893 and the *Administration and Probate Act* 1891, being complied with.

"8. The said reply in effect amounted to a demand for the payment by the plaintiffs to the said defendant of certain duties which the said defendant, as Judge of the Northern Territory, claimed were due to the Commonwealth under the provisions of the said Statutes.

"9. The plaintiffs were unable to proceed with the administration of the estate of the said William Frederick Buchanan in the Northern Territory without obtaining the delivery to them of the said exemplification of probate duly re-sealed, and by reason of the attitude taken up by the said defendant were unable to obtain delivery of the said exemplification without rendering the accounts and returns, and paying the duties, demanded by the said defendant.

"10. The plaintiffs accordingly under protest lodged the accounts and returns usually lodged in South Australia in similar cases, and subsequently, also under protest, paid to the said defendant for and on behalf of the defendant Commonwealth a cheque for £4,471 4s. 8d., being £4,270 19s. 8d. for succession duty and £200 5s. for probate duty as assessed by the said defendant the Honourable David J. D. Bevan. The defendants allege that the said sums are the correct amounts payable for

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succession and probate duty respectively under the above-mentioned South Australian Statutes, but the plaintiffs do not admit this to be so.

"11. The said defendant duly acknowledged the receipt of the said respective sums and noted that the same were paid under protest and paid the same in due course to the defendant Commonwealth.

. . . . . .

"13. The plaintiffs contend that no duties of any kind are payable by them to the Commonwealth in respect of the assets of the deceased situate in the Northern Territory, either under the Statutes mentioned in paragraph 7 hereof or at all.

"14. The defendants contend that the same duties are payable by the plaintiffs to the Commonwealth in respect of such assets as would have been payable to the Government of South Australia if the *Northern Territory Acceptance Act* 1910 had not been passed.

"The questions for the opinion of the Court are:—

"1. Whether any, and if so, what duties are payable by the plaintiffs as executors of William Frederick Buchanan deceased to the Commonwealth in respect of the assets of the said William Frederick Buchanan situated in the Northern Territory at the date of his death.

"2. Whether the defendant the Honourable David J. D. Bevan can be joined as a defendant in this action."

At the hearing, the case was amended as stated in the judgment of *Barton* A.C.J.

Langer Owen K.C. and *Maughan*, for the plaintiffs. The laws of South Australia which, by sec. 7 of the *Northern Territory Acceptance Act* 1910 and sec. 5 of the *Northern Territory (Administration) Act* 1910, are said to be in force in the Northern Territory as laws of the Commonwealth, must be subject to some limitation. It cannot include laws clearly inapplicable, such as the laws as to representation in the South Australian Parliament. The Court will give the widest construction to those sections, but it will not hold that Acts imposing taxation are included so as to render the two Northern Territory Acts obnoxious to the provisions of secs. 54 and 55 of the Constitution.

[BARTON J.—The question is whether those sections apply to legislation in respect of territories.]

If the Northern Territory had simply been taken over, then all the substantive general laws of South Australia would have remained in force, but not the political laws: *Story's Commentaries*, sec. 1,324. [They also referred to *Quick and Garran's Constitution of the Australian Commonwealth*, p. 364; *Oriental Bank Corporation* v. *Wright* (1).]

[ISAACS J. referred to *Mormon Church* v. *United States* (2); *Downes* v. *Bidwell* (3).

GAVAN DUFFY J. referred to *Harrison Moore's Commonwealth of Australia*, 2nd ed., p. 589.]

Taxing Acts are political laws, and would not remain in force. The laws that are intended to be imposed by the Northern Territory Statutes are those which have remained in force on a mere taking over. The Commonwealth Parliament in legislating under sec. 122 of the Constitution must be governed by the provisions of secs. 53 to 56. The Acts of South Australia referred to in the two Northern Territory Statutes are those Acts which could be passed in the way in which those two Statutes were passed. It cannot be said that the taxation in question here is imposed in clear and unambiguous language. If the Northern Territory Statutes purport to enact as Commonwealth laws the two South Australian Acts, and to impose the duties therein referred to, then the Statutes are invalid under sec. 55 of the Constitution. Secs. 53 to 56 apply generally to all legislation by the Commonwealth Parliament. The provision in sec. 19 of the *Northern Territory Acceptance Act* that nothing in the Act is to be taken to be an appropriation of revenues or moneys refers to sec. 54 of the Constitution, and shows that Parliament was careful to see that the rules laid down by the Constitution should not be infringed by them.

[ISAACS J. Does "The Commonwealth" in sec. VI. of the *Constitution Act* include a territory acquired by the Commonwealth?]

That refers to the entity, and not to the land.

(1) 5 App. Cas., 842.

(2) 136 U.S., 1, at p. 44.

(3) 182 U.S., 244.

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[ISAACS J. Part V. of Chapter I. of the Constitution relates to laws for "the Commonwealth." Does any of that Part apply to laws made under sec. 122 ?

GAVAN DUFFY J. Is not the whole power as to a territory contained in sec. 122 ?]

There are three powers of legislation conferred on the Parliament, namely, under secs. 51, 52 and 122, and the provisions in secs. 53 to 56 apply to each of them.

[ISAACS J. The provisions in sec. 55 seem to be limited to the power conferred by sec. 51 (ii.), which is a power of taxing the people of the Commonwealth, not a power of taxing the people in a territory.

GAVAN DUFFY J. Can the limitation in sec. 51 (ii.) on the power of taxation, viz., "but so as not to discriminate between States or parts of States," apply to a territory ?]

Sec. V. of the *Constitution Act* contemplates the Commonwealth as consisting of something else besides the States, and indicates that a territory is part of the Commonwealth. The seat of government is, under sec. 125 of the Constitution, in the same position as a territory, and the laws in force there are dealt with in the same way in the *Seat of Government Acceptance Act* 1909, sec. 6, and the *Seat of Government (Administration) Act* 1910, sec. 4. A territory surrendered by a State to the Commonwealth becomes, under sec. 111 of the Constitution, subject to the exclusive jurisdiction of the Commonwealth, and by sec. 52 (i.) the Parliament is given exclusive power to legislate as to such territory, and also as to the seat of government. Both become parts of the Commonwealth, and legislation as to them is subject to the rules laid down in Chapter V. Secs. 81 to 83 provide for all revenue being paid into one fund, and being appropriated in a certain way. That must include revenue from a territory, and secs. 53, 54 and 56, which apply to all laws for the appropriation of revenue, must apply to revenue from a territory. There is no reason why laws imposing taxation in a territory should be excluded from the rules as to laws imposing taxation in other parts of the Commonwealth.

Rolin K.C. and *Armstrong*, for the defendants. The power

conferred by sec. 122 of the Constitution is complete in itself, and legislation under it is not subject to the restrictions imposed by sec. 55. Sec. 5 of the *Northern Territory (Administration) Act* is not a law imposing taxation, but it is a re-enactment, as a federal Act, of, amongst others, an Act of South Australia which imposes taxation, and which, in the absence of anything the Commonwealth Parliament might say, would, by virtue of the Constitution, remain in force in the Territory: See *Halsbury's Laws of England*, vol. x., par. 986; *Hawaii* v. *Mankichi* (1). A judicial officer should not be joined in an action unless he is personally liable: *Baylis* v. *Bishop of London* (2); *Quick and Garran's Constitution of the Australian Commonwealth*, p. 364.

[ISAACS J. referred to *Sargood Brothers* v. *Commonwealth* (3).]

Langer Owen K.C., in reply, referred to *Quick and Garran's Constitution of the Australian Commonwealth*, p. 550.

Cur. adv. vult.

May 9.

BARTON A.C.J. read the following judgment:—This matter comes before us by way of special case stated by agreement of the parties. The plaintiffs seek to recover two sums of money, namely, £4,270 19s. 8d. and £200 5s., paid by them to the Honourable D. J. D. Bevan, one of the defendants, and Judge of the Northern Territory, and by him paid over to the other defendant, the Commonwealth. These sums were assessed by Judge Bevan, the one as succession duty and the other as probate duty, on certain leasehold and other personal estate in the Territory possessed by the late W. F. Buchanan, of Narrabri, New South Wales—who at the time of his death was also entitled to considerable real and personal estate in New South Wales and other States. He made a will and a codicil, and died in May 1911, a few months after the acceptance of the Territory by the Commonwealth, as will appear. The plaintiffs being named as executors, probate was granted to them by the Supreme Court of New South Wales in November 1911. In February 1912 the plain-

(1) 190 U.S., 197.

(2) (1913) 1 Ch., 127, at pp. 136, 139.

(3) 11 C.L.R., 258.

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tiffs applied to the then Judge of the Territory, the Hon. S. J. Mitchell, to have an exemplified copy of the instrument of probate re-sealed with the seal of the Northern Territory. In April 1912 Judge Mitchell informed them that the exemplification had been re-sealed in the Court of the Territory and that it "awaited returns," meaning I take it the account and returns purporting to be required under the Acts I am about to mention. On a further application, made in May 1912 to Judge Bevan, who had succeeded Judge Mitchell, the plaintiffs were informed that the exemplification would be delivered "on the requirements of the *Succession Duties Act* 1893 and the *Administration and Probate Act* 1891 being complied with." Those Acts prescribed, *inter alia*, the payment of certain duties. To obtain the exemplification, therefore, the plaintiffs lodged an account and returns and paid the two sums in question under protest. Then they brought this action, and by the special case we are asked to determine: (1) Whether the plaintiffs became liable to pay any duties in respect of the testator's assets in the Northern Territory, and if so, what duties? and (2) whether Judge Bevan can be joined as a defendant in this action?

The parties have further agreed as follows:—

"If the Court in answer to question 1 holds that any duties are payable, the action is to be dismissed with costs, including the costs of the special case, and the Commonwealth undertakes to refund any sum overpaid.

"If the Court holds that no duties are payable, then the plaintiffs are to recover from the Commonwealth the two sums named, with costs of suit and of the special case.

"If the second question be answered in the negative, the action is to be dismissed as against the defendant Bevan, who, however, does not ask for the costs occasioned by his joinder as a defendant."

The two Acts mentioned were passed in South Australia before the acceptance of the Territory by the Commonwealth, and it is not disputed that up to the acceptance they were in force in the Territory. That acceptance took place by and under the *Northern Territory Acceptance Act* No. 20 of 1910, assented to on the 16th November of that year and brought into force by Proclamation on the 1st January 1911. Sec. 7 (1) of that Statute

enacts that "all laws in force in the Northern Territory at the time of the acceptance shall continue in force, but may be altered or repealed by or under any law of the Commonwealth." By section 8, all Courts of Justice in existence in the Territory at the time of its acceptance are to continue until other provision is made by or under any law of the Commonwealth. By sec. 10, all estates and interests held from the State of South Australia within the Territory at the time of its acceptance shall continue to be held from the Commonwealth on the same terms and conditions. By sec. 19, nothing in the Act is to be taken as an appropriation of any revenues or money.

On the same 1st January, and by the same Proclamation, the *Northern Territory (Administration) Act*, No. 27 of 1910, came into force. Sec. 5 is as follows:—"Where any law of the State of South Australia continues in force in the Territory by virtue of sec. 7 of the *Northern Territory Acceptance Act* 1910, it shall, subject to any Ordinance made by the Governor-General, have effect in the Territory as if it were a law of the Territory."

By sec. 13, until the Parliament makes other provision for the government of the Territory, the Governor-General in Council is empowered to make ordinances having the force of law in the Territory.

Sec. 12 gives the several Courts of South Australia, subject to any Ordinance to be made, the same jurisdiction for the enforcement of all laws in the Territory and the administration of justice therein as they had before the commencement of the Act.

Having regard to these enactments the Commonwealth contends that the plaintiffs are liable to pay the same duty to it on the assets in the Northern Territory as would have been payable to the Government of South Australia, if the Acceptance Act had not been passed.

The plaintiffs say they owe no duties to the Commonwealth in respect of the assets in the Northern Territory, under either of the South Australian Acts, or at all. Their first contention is that, whatever effect sec. 7 of the *Northern Territory Acceptance Act* and sec. 5 of the *Northern Territory (Administration) Act* may have in continuing legislation which consists of

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ordinary rules of conduct, they have not the effect of applying, or at any rate they should not be construed as applying, to the Territory the taxing enactments of the two South Australian Acts. Next, they say that, if the first contention is not adopted, the two federal enactments are laws imposing taxation and that, for reasons I will state, they are, as such, invalid.

I confess my inability to appreciate the distinction on which the first contention rests. The Northern Territory is "territory surrendered by" a "State to and accepted by the Commonwealth," and by sec. 122 of the Constitution the Parliament has power to make laws for any such territory. It can, therefore, make tax laws to operate there. If, then, under this power the general rules of conduct which existed in the Territory before its acceptance can be continued in force, why not the tax laws as well?

Mr. *Owen*, for the plaintiffs, pointed out that the surrender and acceptance of the Territory are equivalent to the cession of territory by one Power to another by treaty, and that the effect of such a transaction is that "the ceded territory becomes a part of the nation, to which it is annexed, either on terms stipulated in the treaty, or on such as its new master shall impose. . . . But the general laws, not strictly political, remain as they were, until altered by the new Sovereign": *Story's Commentaries on the Constitution of the United States*, sec. 1324. The federal provisions in question become in this view a mere legislative declaration of that which, without it, would have been the legal position, unless the "general" laws which, existing prior to the surrender, were carried over with it, are deemed to be exclusive not only of strictly political but also of taxation laws. I find no sufficient reason to conclude that taxation laws are so excluded, nor any foundation for such a construction, which would in effect pronounce that while laws conferring advantages are retained, those imposing liabilities are dropped. If they are excluded, the federal enactments, in my opinion, substantively prescribe them for the Territory. If they are not excluded, then the federal enactments merely give the *imprimatur* of the authority of the Commonwealth to the retention of their laws by the inhabitants of the Territory, whether they be taxation Acts or laws of any other kind. In either view the contention fails, and we cannot

hold that the respondents are entitled to assert the right conferred by those Acts and, at the same time, to shake off the fiscal liabilities which they prescribe. If, indeed, the two Northern Territory Statutes neither increase nor diminish the force which the South Australian Acts would retain notwithstanding the surrender, the question arises whether those Acts do not still impose on the plaintiffs, *proprio vigore*, the liability to pay to the new masters of the Territory the duties claimed. I do not decide that question; first, because I do not think that the parties ever meant to raise it by the special case, and next, because, quite apart from it, I think the federal Acts impeached by the plaintiffs' second contention are, and ought to be judicially declared, valid.

The second contention is stated thus: If the intention of the Northern Territory Acts is to apply to the Territory the taxing provisions of the South Australian laws in force at the time of the surrender, these federal Statutes thus become laws imposing taxation, and each "deals with" as many subjects of taxation as are to be found in the South Australian laws. Of these subjects they have pointed out two—namely, sec. 27 of the *Administration and Probate Act* 1891, and sec. 6 of the *Succession Duties Act* 1893 with the Second Schedule and the definition of "administrator" in sec. 4. There may be more taxing provisions in other South Australian Acts, applying in the Territory at the cession, and continued in it by the Territory Act; but these two, they say, are enough. For each of the South Australian enactments deals with a separate subject of taxation, and each of the two federal Acts deals with both. But "laws imposing taxation, except laws imposing duties of Customs or of excise, shall deal with one subject of taxation only": Constitution, sec. 55. Hence, say the plaintiffs, both of the federal Acts are wholly invalid.

Reference was made to *Osborne* v. *The Commonwealth* (1). There certain opinions were expressed as to the meaning of sec. 55, and, more particularly, the meaning of its second paragraph, on which the plaintiffs now rely. As it happened, those opinions were not necessary to the decision of the case.

If the statement of an opinion on the same question were necessary in the present case, those of us who took part in the

(1) 12 C.L.R., 321.

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consideration of *Osborne's Case* (1) would be bound to say whether they were prepared to restate in the form of a judicial decision the opinions there expressed. I wish to guard myself against any supposition that I recede from anything that I there said. But there is a question which must be determined before we can decide whether laws imposing taxation, which deal with more than one subject of taxation, are or are not invalid. We must be satisfied that sec. 55 is intended to apply to federal laws made in exercise of the power given by sec. 122. And on full consideration I am not satisfied that it is so intended.

Among the powers of the Parliament to make laws for the peace, order and good government of the Commonwealth, sec. 51 places, as par. (ii.), the power to legislate with respect to "Taxation; but so as not to discriminate between States or parts of States." In considering whether the intention was to include within the ambit of this power taxation imposed on the people of a territory under sec. 122, it will be well to consider also the probability, looking at the nature of the Constitution, of an intention to involve the work of legislating for a territory, especially at the outset of its existence as such, in the very great difficulties that would ensue. It is necessary at that stage to provide a revenue for the new acquisition. It will generally be thinly populated, so that one source of taxation may not suffice for its needs, or the taxation existing at the time of cession may not suffice to defray the expenses in which its new status involves it. Or, on the other hand, a very little may suffice. Generally, it will not be convenient or right to leave all the pre-existing laws to operate in the new territory without alteration or addition. (For example, reference may be made to what Parliament has thought necessary in secs. 6, 7, 8, 9 and 10 of the *Northern Territory (Administration) Act*, in sec. 6 of the *Seat of Government Acceptance Act* 1909, and in secs. 3, 5, 6, 7 and 9, and the Schedule of the *Seat of Government (Admistration) Act* 1910.) In the last-named case it was thought necessary, in addition to applying several federal Acts, to prevent the application of a number of the Acts of the ceding State, including all Acts imposing rates, taxes, or duties, with the exception of one

(1) 12 C.L.R., 321.

class of taxing Acts. Now, I will suppose that the federal authority, in legislating for the acceptance and administration of a new territory under sec. 122, finds it necessary to continue some of the State laws, exclude others, and apply some of the Commonwealth laws, and to make provision for administration. If it does such things without express regard to taxation, one of these results will follow: either it will have continuing taxation which it does not want, or it will be without sufficient revenue from the territory to meet the new cost of administration. These may be serious evils, but if the contention of the plaintiffs be right, they must go on until new Acts dealing with taxation can be passed, for, if the contention be right, the federal authority cannot include such matters in its Acts for acceptance and administration without involving its Statute in invalidity. Nor can it meet the difficulty by dealing with taxation before acceptance of the territory, since it has not any legislative power until acceptance.

Now, I do not believe that the framers of the Constitution failed to foresee that evils such as these would result if they subjected legislation for a territory to these dangers and disabilities. I believe that they avoided the evils by the structure of the Constitution. In the first place, it must be observed that sec. 122, by itself, contains all the necessary power to legislate for a territory, including the imposition or continuance of any kind of taxation. It does not need any assistance from sec. 51 in respect either of taxation, or of anything else. It would suffice for all its purposes if there were no sec. 51 at all. It is more ample than sec. 51 for all the purposes of a territory.

Next, sec. 122 is placed in a part of the Act separated by four chapters relating, respectively, to "The Executive Government," "The Judicature," "Finance and Trade," and "The States," from Chapter I, relating to the Parliament. It is well to consider here how the Parliament is constituted. It consists of the Sovereign, a Senate and a House of Representatives. The Senate represents the several States as separate entities (sec. 7) and equally, as parties that have entered into the federal compact as equals, while the House of Representatives represents the people according to their numbers, but only the people in the several States (sec. 24).

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It does not represent any people outside the States. Territories, therefore, have no representation in it while they continue to be territories. As differences of opinion on the relative rights of Commonwealth and State might be expected to arise between two Houses whose sources were so distinct, it was thought necessary, besides giving the Parliament powers both as to taxation and as to ordinary legislation, to see that the States were fairly dealt by. That is obviously the origin of the proviso safeguarding the exercise of the taxation powers in sec. 51 (2), namely: "so as not to discriminate between States or parts of States." This care for fair dealing with the States, which it is my duty now neither to extol nor to condemn, but merely to point out, is also to be seen in sec. 55. That section first provides that laws imposing taxation shall deal only with the imposition of taxation. They may "deal with" the imposition of taxation in addition to imposing it. That is, they are confined to two things: the laying on of the tax and the provisions properly relevant or incidental to that object, such as machinery for collection and administration, exemptions, deductions and the like. "Any provision therein dealing with any other matter shall be of no effect." The entire Act is not invalid, but its provisions extraneous to the object of taxation are made mere nullities. The paragraph is clearly to protect the House representing the States from being faced with the alternative of rejecting a tax Bill necessary for the adjustment of the finances, or passing it with the addition of some matter of policy independent of taxation, to which they might be emphatically opposed.

The second paragraph of sec. 55 is further evidence of the protection sought to be thrown round the House which represents the States as such. "Laws imposing taxation, except laws imposing duties of Customs or of excise, shall deal with one subject of taxation only," &c. That provision, as I pointed out in *Osborne's Case* (1), is designed to prevent the tacking together of proposals relating to taxation of different kinds in one measure—more than one such proposal, and, perhaps, a number of them. This tacking, if successful, would (I quote a few words I then used) "annihilate the intended powers of the Senate, who, favouring some and dissenting

(1) 12 C.L.R., 321, at p. 353.

from the rest, would find themselves forced either to pass the entire agglomeration, . . . or to reject all, and thus perhaps cripple the finances of the Commonwealth." The Senate was clearly intended, among its other powers, to be able in some measure to protect the States from aggression, as the several instances show.

Here there is a purpose running through the provisions for the composition and functions of the two Houses, which has no relevance to the purposes for which the Parliament is empowered to legislate for the territories of the Commonwealth. It must be remembered that the checks of sec. 55 are imposed with relation to Acts and not to mere Bills; to "laws imposing taxation," not to "proposed laws imposing taxation." In this respect sec. 55 differs very markedly from the rest of the cluster, except sec. 59, which obviously refers to a complete law passed by both Houses, and assented to by the Governor-General. There is, therefore, much to be said for the argument that if sec. 55 were not obligatory to the Court it would be futile, since after the Royal Assent, no authority except the Court could interpret or enforce the provision, while the Houses have ample hold of Bills not yet passed. And, if I had to decide the matter to-day, I should perhaps hold that sec. 55 is mandatory as to its second paragraph; and we know that it is expressly made mandatory in respect of so much of its first paragraph as relates to provisions dealing with any matter other than taxation. But other sections in the same connection, such as 53 and 54, relating to Bills in course of passage, are for the ordering of business between the two Houses, and are clearly directory only. It is quite conceivable that if a Bill were being dealt with under the power given by sec. 122 and not under any of the powers enumerated in sec. 51, the purpose of such directory sections could be served by agreement between the two Houses, either *pro hac vice* or by Standing Order, and, if thought necessary, by any modification of the processes contained in such sections. But on this subject it is not necessary to be definite.

I return to the strong connection between sec. 51 (ii.) and sec. 55. Both of them are in a form devised for the protection of State interests, a purpose having no place, nor any analogy, in sec. 122. They are checks on a Parliament primarily intended to

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exercise great legislative powers with a due regard to those interests. True, it is this very Parliament which has to execute the powers of sec. 122. But, in exercising them, it is scarcely probable that it was intended to be bound by checks devised for other purposes and to protect other interests. I cannot think, then, that in legislating for a territory in pursuance of sec. 122 Parliament is bound to have regard to the provisions of sec. 55, which, in my judgment, are referable to "taxation" only as the word is used in sec. 51 (ii.)—the taxation of a Commonwealth whose component parts are the States. Territories, until they become States, are dependencies, and not in this sense component parts of the Commonwealth; and legislation for them, when it takes the form of taxation, is not, in my opinion, the taxation of the Commonwealth which is the subject matter of secs. 51 (ii.) and 55.

I therefore think the first question should be answered, "Yes; the duties already paid by the plaintiffs and mentioned in the special case."

As to the second question, I answer it in the negative. I cannot suggest any reason to justify the joinder of Judge Bevan as a defendant. If the Court were dealing with a motion for prohibition, a judicial authority whose jurisdiction was in question might be made a party respondent. But there is no relation to that position in the present case.

In the result the plaintiffs fail. The questions being answered as above, judgment will be entered for the defendants on the special case, and the action will be dismissed. The plaintiffs will pay to the defendant Commonwealth its costs both of the special case and of the action. With respect to the defendant Bevan there is no order as to costs.

ISAACS J. read the following judgment:—The plaintiffs, as executors of the will and codicil of William Frederick Buchanan, claim the return of two sums of £4,270 19s. 8d. and £200 5s. paid by them, as succession and probate duties respectively, to the defendant David J. D. Bevan, as Judge of the Supreme Court of the Northern Territory, for and on behalf of the Commonwealth, and by him admittedly paid in due course to the Commonwealth.

The plaintiffs had applied for and obtained the re-sealing, with the seal of the Northern Territory, of an exemplified copy of the probate of the will and codicil, but Judge Bevan refused to deliver the re-sealed exemplification until the duties were paid as required by two Statutes originally passed by the Parliament of South Australia, the *Administration and Probate Act* 1891 and the *Succession Duties Act* 1893.

These Acts were in force in the Territory before its cession by the State of South Australia to the Commonwealth.

Under protest, the sums demanded were paid in order to obtain the exemplification; and the plaintiffs' case is that those Acts are, for reasons to be presently mentioned, not now in force in the Territory, that the sums were therefore illegally demanded *colore officii*, and should now be returned.

Some doubt exists as to whether the actual amounts are correct, supposing the Acts are in force, but it has been agreed to treat that as a matter for adjustment; and so the special case as amended seeks, as against the Commonwealth, merely a decision whether any duties whatever are payable, in which case the action is to be dismissed with costs, adjustment to follow, and if no duties are payable, the plaintiffs are to recover back the amount paid with costs.

With respect to the individual defendant, if the Court thinks the action does not lie as against him, it is to be dismissed without costs.

So far as concerns Judge Bevan, it is clear law that such an action cannot be sustained against a public officer in such circumstances.

I have stated my reasons in a similar case in *Sargood Brothers* v. *Commonwealth* (1), and need not repeat them.

As to the Commonwealth, the plaintiffs contended that sec. 7 of Act No. 20 of 1910, the *Northern Territory Acceptance Act* 1910, and sec. 5 of Act No. 27 of 1910, the *Northern Territory (Administration) Act* 1910—both Acts proclaimed to commence on 1st January 1911—do not, on their proper construction, apply to such South Australian Statutes as those referred to; and,

(1) 11 C.L.R., 258, at pp. 303, 304.

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further, if they do, then that they have no legal force, so far, at all events, as they affect to bring those Statutes into operation.

And the grounds of those contentions, are: first, that the provisions of the Statutes, referring as they do to the seal of the Supreme Court of South Australia, the Public Trustee, the Registrar, and the Local Court of Adelaide, and so on, are inapplicable, and therefore not within the fair meaning of the Commonwealth Acts.

But those matters are foreseen and provided for by sub-secs. (2) and (3) of sec. 7 of the Acceptance Act, and the Statutes in question are not, on the mere construction of the Acceptance Act, when looked at in order to discover the intention of Parliament, left outside the scope of the Commonwealth Acts.

The second ground is, that the laws of which secs. 7 and 5 referred to, form part, offend against the provisions of sec. 55 of the Constitution.

The first part of that section nullifies every provision in any law obnoxious to that part except the taxing provision. So far the objection would leave the plaintiffs in no position of advantage, unless some other constitutional objection to validity existed, as, for instance, inseparability of the taxing provision in the particular circumstances from the rest of the Act, or the effect of some other direct provision of the Constitution. Sec. 7 of the Acceptance Act could have no meaning if the rest of the Act disappeared, because there would be no "acceptance," and sec. 5 of the Administration Act is dependent on the first-named section.

But, further, say the plaintiffs, the second part of sec. 55 is broken, because two subjects of taxation—succession and probate—are included in the one Act, with the result, as it is claimed, of total invalidity as to both.

The Crown's answer is twofold:—First, that, even assuming the challenged legislation is bad by virtue of sec. 55 of the Constitution, still, apart from express legislation, all municipal laws in force at the time of cession of the Territory remain in force until negatived by the new sovereign authority, and that the taxing Acts of 1891 and 1893 come within the designation of municipal laws. The second answer is that the impeached sections, though involving the independent enactment *in globo*

under Commonwealth authority of all laws previously in force, are not subject to sec. 55 of the Constitution, because they are not enacted by virtue of the powers contained in sec. 51, sub-sec. (ii.), but of the separate and distinct power contained in sec. 122, which is specifically directed to laws for the government of a territory.

Both points are of great importance, but, in the view I take, it is not necessary to determine whether the *Succession Duties Act* and the *Administration and Probate Act* passed, *proprio vigore*, to the Commonwealth on the cession. The 27th section of the *Administration and Probate Act* 1891 provides:—"No probate or administration shall be so sealed until the payment of all probate and other duties (if any)," &c. The words "if any" leave open the question of the existence of any such duties.

American references were cited, as to the class of laws which continue on cession. Were it necessary to determine the question whether on cession there continued an impost enacted by the former Sovereign, not specially and exclusively for the support or regulation of the ceded territory, but for the general requirements of his whole Dominion, a close examination of various cases and of important principles would be demanded. There are English cases as well as American. The latter, which do not by any means explicitly support the Crown's view—rather the contrary,—include *United States* v. *Percheman* (1) in 1833, where *Marshall* C.J., following his previous decision in *American Insurance Co.* v. *Canter* (2) in 1828, says:—"The people change their allegiance; their relation to their ancient Sovereign is dissolved: but their relations to each other, and their rights of property, remain undisturbed."

Then, in *Chicago and Pacific Railway Co.* v. *McGlinn* (3), *Field* J., for the Court, said:—"Whenever political jurisdiction and legislative power over any territory are transferred from one nation or Sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or Sovereign." And so in *Ponce* v. *Roman Catholic Church* (4).

(1) 7 Pet., 51, at p. 87.
(2) 1 Pet., 511.
(3) 114 U.S., 542, at p. 546.
(4) 210 U.S., 296, at p. 310.

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The English cases go back very much further, and may or may not be wider in their terms and import. In an *Anonymous Case* (1) in 1722, it was said of a conquered country "until such laws" (that is, new laws) "given by the conquering prince, the laws and customs of the conquered country shall hold place," with exceptions mentioned immaterial to the present case. In *Campbell* v. *Hall* (2) Lord *Mansfield* says:—"Laws of a conquered country continue until they are altered by the conqueror." *Ruding* v. *Smith* (3) was determined by Lord *Stowell* in 1821, and was, doubtless, present to the mind of *Marshall* C.J. when he decided *Canter's Case* (4) and *Percheman's Case* (5). In *Ruding* v. *Smith* Lord *Stowell* said (6):—"No small portion of the ancient law is unavoidably superseded, by the revolution of government that has taken place. The allegiance of the subjects, and all the law that relates to it—the administration of the law in the Sovereign, and appellate jurisdictions—and all the laws connected with the exercise of the sovereign authority—must undergo alterations adapted to the change." Some further observations of the learned Judge are thought by Mr. *Tarring* in *The Law relating to the Colonies*, 3rd ed., at p. 17, to be stated too broadly. And see also *West Rand Central Gold Mining Co.* v. *Rex* (7).

These authorities, and others of a similar nature, would give serious ground for consideration as to whether cession, though as a matter of necessity (see *Blankard* v. *Galdy* (8)) preserving the general laws affecting the inhabitants and constituting these laws, so to speak, the common law of the territory, and though it dissolves the tie between the former Sovereign and the people and territory, goes so far as to transfer and continue the imposts which the former Sovereign had enacted for his own general support and government, or his political objects. However, that question, though involved in the argument, is unnecessary to the judgment, and for the following reason:—

The Commonwealth Statutes in terms adopt and in effect re-enact the Acts of South Australia so far as they apply to the Territory in its new condition, and certainly include the two Acts in question.

(1) 2 P. Wm., 75, at p. 76.
(2) 20 St. Tr., 239, at col. 323.
(3) 2 Hag. Con., 371.
(4) 1 Pet., 511.
(5) 7 Pet., 51.
(6) 2 Hag. Con., 371, at p. 382.
(7) (1905) 2 K.B., 391, at pp. 410, 411.
(8) 2 Salk., 411.

But the clear power contained in sec. 122 is independent of that contained in sec. 51 sub-sec. (ii.). The last-named power—"Taxation; but so as not to discriminate between States or parts of States"—applies to the Commonwealth proper. The Northern Territory, though "annexed" to South Australia, and in one sense a "part" of that political organism, was always known by the distinctive name of the "Northern Territory," and in the official despatches between the Government of South Australia and the Colonial Office reference is made to South Australia proper and to the Northern Territory. See *per Way* C.J. in *Adelaide Steamship Co. Ltd.* v. *Wells* (1). And now that it is a territory of the Commonwealth, it is not fused with it, and the provisions of secs. 53 and 55 of the Constitution, intended to guard the Senate and the States, have no application to the Northern Territory. The taxation involved in the Northern Territory Acts is quite outside the "taxation" referred to in sec. 55 of the Constitution. Consequently, assuming the South Australian Acts in question did not continue by mere force of cession, still their introduction by means of the Commonwealth Acts is unaffected by the provisions of sec. 55.

In the result, then, the objection fails, the duties are payable, and in accordance with the terms of the special case judgment should be entered for the defendant with costs.

GAVAN DUFFY J. My brother *Rich* and I concur in the conclusion arrived at by the other members of the Court.

Judgment for the defendants on the special case. Action dismissed. Plaintiffs to pay the defendant Commonwealth its costs of the special case and of the action.

Solicitor, for the plaintiffs, *G. S. E. Dale,* Narrabri, by *G. E. Dale.*

Solicitor, for the defendants, *Gordon H. Castle,* Crown Solicitor for the Commonwealth.

B. L.

(1) 18 S.A.L.R., 111, at p. 115.