[HIGH COURT OF AUSTRALIA.]

HEINER . . . . . APPELLANT;
DEFENDANT,

AND

SCOTT . . . . . RESPONDENT.
COMPLAINANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF QUEENSLAND.

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SYDNEY, *Dec.* 7, 8, 9, 18.

Griffith C.J., Barton, Isaacs, Gavan Duffy, Powers and Rich JJ.

Stamp Duty—Cheque drawn on Commonwealth Bank—Federal instrumentality, State tax upon operation of—Stamp Act 1894 (*Qd.*) (58 *Vict. No.* 8), *sec.* 26—*Commonwealth Bank Act* 1911 (*No.* 18 *of* 1911), *sec.* 7—*The Constitution* (63 & 64 *Vict. c.* 12), *secs.* 51 (XIII.), (XXXIX.), 114.

The *Stamp Act* 1894 (Qd.) by sec. 26 imposes a stamp duty of one penny on every inland bill of exchange payable on demand (which term includes a cheque on a banker), and imposes a penalty upon any person who issues such a bill of exchange not duly stamped.

Held, that that section is enforceable against a private citizen of Queensland who draws a cheque upon the Commonwealth Bank of Australia in respect of a current account in that Bank.

APPEAL from a Court of Petty Sessions of Queensland.

On the hearing of a complaint in the Court of Petty Sessions at Brisbane, Ernest Eglinton, Esq., a Police Magistrate, stated the following case under the *Justices Act* 1886 for appeal thereon to the High Court:—

"At the Court of Petty Sessions holden at Brisbane on 18th September 1914 a complaint preferred by Peter Scott (hereinafter called the respondent) under sec. 26 of the *Stamp Act* 1894 against Ernest Frederick Augustus Heiner (hereinafter called the appellant) charging the appellant that 'on 12th September 1914 at Brisbane in the said State he signed an instrument, to wit a

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cheque drawn on the Commonwealth Bank of Australia, Brisbane, for the sum of £7 liable by law to stamp duty, namely, one penny. before the said instrument was duly stamped for denoting the payment of the duty' was heard and determined by me, the said parties respectively being then there represented by counsel, and upon such hearing I convicted the appellant and fined him one shilling and ordered him to pay £2 2s. professional costs, 3s. 6d. costs of Court and 1d. stamp duty, and further ordered that the amount of the fine, costs and duty should be recovered by execution and in default of execution that the defendant should be imprisoned for seven days.

"The appellant, being desirous of appealing to the High Court of Australia from my decision on the ground that it is erroneous in point of law, has duly applied in writing to me to state and sign a case setting forth the facts and the grounds of my decision for appeal thereon to the said High Court of Australia and has duly entered into a recognizance as required by the Statute in that behalf.

"Now, therefore, I, the said Police Magistrate, in compliance with the said Statute do hereby state and sign the following case :—

"1. The respondent and the appellant were respectively represented by counsel on the said hearing. The Commonwealth of Australia by their counsel asked leave to intervene upon the said hearing, and I permitted the said counsel for the said Commonwealth of Australia to be present and to address the Court upon the said hearing on behalf of the said Commonwealth of Australia.

"2. The respondent, who gave evidence in person, proved his appointment as an Inspector of Stamps and produced the instrument the subject matter of the complaint, namely, an unstamped cheque on the Commonwealth Bank of Australia, Brisbane, drawn for the sum of £7 on 12th September 1914 by the firm of Atthow & McGregor who are solicitors. This said cheque was tendered in evidence and marked Ex. 2.

"3. Admissions of fact were made on behalf of the appellant and of the respondent respectively as follows :—

"Counsel for the appellant admitted :

"(i.) That the appellant signed the said cheque.

"(ii.) That the appellant is a partner in the said firm.

"(iii.) That the said firm is a customer and client of and as such has an account current in the Commonwealth Bank of Australia, Brisbane.

"(iv.) That the said cheque was drawn on that account.

"(v.) That the said cheque was tendered by the said firm on 12th September 1914 to the Commissioners of Stamps in payment of stamp duty payable in connection with the business of private clients of the said firm, and not in connection with any business being done by the said firm for or on behalf of the Commonwealth of Australia or of any of its officers, servants or agents.

"(vi.) That the Commonwealth Bank of Australia carries on at Brisbane the general business of banking under the powers conferred upon it by the *Commonwealth Bank Act* 1911.

"Counsel for the respondent admitted that the said cheque was drawn upon the said Bank in the ordinary course of the said Bank's said general business.

"4. At the close of the respondent's case counsel for the appellant asked me to dismiss the complaint upon the following grounds:—

"(*a*) That sec. 26 of the *Stamp Act* 1894 (Queensland) does not apply to cheques issued by or drawn upon the Commonwealth Bank of Australia.

"(*b*) That so far as the said *Stamp Act* 1894 applies to or affects cheques issued by or drawn upon the Commonwealth Bank of Australia the said Act is invalid and inoperative as being an attempt to fetter, control or interfere with the free exercise of the executive powers of the Commonwealth of Australia of which Commonwealth the Commonwealth Bank of Australia is an instrumentality.

"Counsel for the Commonwealth of Australia supported this application upon the same grounds.

"I refused to dismiss the complaint at that stage.

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"5. Counsel for the appellant then called the manager of the said Bank's Brisbane branch, who gave the following evidence:—'I am Brisbane manager Commonwealth Bank of Australia. I look at Ex. 2. Similar forms come from the Commonwealth Bank in book form. The Commonwealth Bank pays for the preparation of them. A record is kept of every cheque book that is issued, and customers have to sign for them. We charge for keeping an account in some cases only. In this particular case no account is charged. We give the cheques to customers on application, and they sign for them. When customers wish to withdraw money they fill in the blank form and it comes back to the Bank. They do not come back in blank form unless we ask for them. I have asked for a cheque book to be returned. I have done that when an account is unsatisfactory and we desire to close an account. My bank is carrying on business in Brisbane under the Act and Ex. 2 was drawn on the Bank in the ordinary course of business under the Act and if it were presented to the Bank would be paid.'

"By Mr. Henchman.—'The branch of the Bank in Brisbane of which I am manager carries on the ordinary business of a bank. It also does business for the Commonwealth. Its ordinary private clients do business in exactly the same way as with other banks. They have current accounts, have overdrafts and receive advances on security just the same as in any other bank. The contract between the customer and the Bank where the customer has a credit is the ordinary banking contract. The Bank contracts to honour cheques of customers on presentation, if account is in credit. Every trading bank in Brisbane issues blank forms of cheques to its customers. They usually are impressed with a stamp. As far as I know every other bank's cheques in Brisbane but my bank and the Government Savings Bank are impressed with a stamp. The Bank issues these blank forms duly stamped to customers on payment of duty only. They do not charge for the form. As a rule a customer gets books without any trouble, in two banks in Brisbane they have to sign. All the banks keep a record of the books of cheques issued and to whom they are issued. They issue them only to customers. On the closing of an account it is the practice of the banks where asked to do it to

receive back unused cheque forms from customers and to refund them unused stamp duty thereon. We have different ledgers for different people, the Commonwealth have one or two. We make a profit out of Commonwealth business on transactions similar to ordinary business. When the Commonwealth Government lent the Queensland Government a large sum of money last year the Bank made no profit on it. We have special arrangements with the Commonwealth for doing its business. These arrangements are different from those on which we do business for ordinary customers and more advantageous to the Commonwealth. Apart from that our business is no different from any trading bank.'

"By Mr. Graham.—'Different customers receive different treatment the same as other banks,—a big customer receives special treatment. In that way the Commonwealth are no different to other people. We balance daily. The Commonwealth account is balanced with the others; we have no special balance for them. They have a special ledger, just the same as other banks have for a big customer. We do no business except that authorized by Act of Parliament.'

"By Mr. Henchman.—'The banks have not a fixed rate for overdraft for all customers. There is a usual rate with many exceptions. By arrangement with the banks there is a general rate from time to time. We are not in the associated banks. As a rule we do business at the same rate as other banks, but not by arrangement with the other banks. The banks have a clearing house. We do not operate on it. We exchange cheques of other banks that come into our possession, the same as other banks. There is no clearing house in Brisbane.'

"6. On the above evidence counsel for the appellant asked me to hold that the cheque Ex. 2 was the property of the said Bank and, therefore, as the said Bank was an instrumentality of the Commonwealth, the property of the Commonwealth, and was therefore exempt from taxation by a State by virtue of the provisions of sec. 114 of the Constitution. On this ground, as well as on the ground previously taken by him, he asked me to dismiss the complaint. Counsel for the Commonwealth also addressed

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me in support of a dismissal of the complaint upon the same grounds.

"7. Counsel for the respondent did not contend that sec. 26 of the *Stamp Act* 1894 would apply to cheques drawn upon the Commonwealth Bank by the Commonwealth, its officers, servants or agents, for the purposes of Commonwealth business. He submitted, however, that that section did apply to cheques such as Ex. 2 drawn by private customers of the Bank for their own purposes on their current accounts in the ordinary course of the Bank's general banking business; that the duty imposed by the *Stamp Act* is imposed on the customer and not on the Bank or its property; that the said Bank, so far as concerns its general banking business, is not a Commonwealth instrumentality within the rule laid down by the case of *D'Emden* v. *Pedder* (1); that the said Bank, so far as regards its transactions with private clients in the ordinary course of a banker's general business, is subject to the general and undiscriminating laws of a State regulating transactions between banker and customer within that State; that the evidence showed that the cheque was the property of the customer and not the property of the Bank or of the Commonwealth; and that the duty imposed by the *Stamp Act* is not a tax on property of the Commonwealth within the meaning of sec. 114 of the Constitution.

"Being of opinion that the said cheque was an instrument liable by law to stamp duty within the meaning of sec. 26 of the *Stamp Act* I convicted the appellant as aforesaid.

"The question of law arising in the above case is:

"Was I right in convicting the appellant upon the said charge?

"Whereupon the opinion of the High Court is asked upon the said question of law, whether or not I, the said Police Magistrate, gave a correct decision as above stated; or, if not, what should be done or ordered by the said Court or by me in the premises?"

Campbell K.C. (with him *Alec Thompson* and *Harry Stephen*), for the appellant. The Commonwealth Bank is by its special constitution a department of the Commonwealth Government.

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

See *Commonwealth Bank Act* 1911, secs. 6, 7, 8, 10, 11, 18, 19, 30, 33, 53, 56. That Act is within the power conferred by sec. 51 (XIII.) and (XXXIX.) of the Constitution. The power to create the Bank exists independently of any special power, on the same principle as that on which in the United States it was held that Congress was entitled to create a bank under its general power to legislate: *M'Culloch* v. *Maryland* (1). A bank is an appropriate and convenient instrument for the exercise of the governmental powers of the Commonwealth. It being reasonable for the Commonwealth to create a bank as such an instrument, it is necessary to give it the ordinary powers of a bank because otherwise it would not have the necessary vitality. The general banking business of the Bank is an essential and organic part of the Bank's constitution, in the sense that without it the capacity of the Bank to serve the main purpose of its creation would be seriously impeded if not destroyed. The Commonwealth having constituted the Bank may employ it for the purposes for which it is fitted. The number of the functions for which the Bank may be used cannot affect the general question of the aptness of the instrument to its purpose. The Bank, having been created as an instrumentality of the Commonwealth, is beyond the State power of taxation. A tax upon a cheque drawn on a current account in the Bank is a tax on the transaction evidenced by the cheque or to which the cheque relates. It is a tax on the operations of the Bank. The tax is a direct interference with the operations of the Bank just as a tax on a receipt for money paid by the Commonwealth was held to be in *D'Emden* v. *Pedder* (2). Any tax upon the practical means of doing an act is a tax upon the act. If a particular operation can only be effected by a particular instrument, a tax on the instrument is a tax upon the operation.

[ISAACS J. referred to *Farmers Bank* v. *Minnesota* (3).]

If a State can tax the means of drawing money from the Bank, that operates upon the business of the Bank and may be made destructive of the Bank.

[He also referred to *Osborn* v. *Bank of United States* (4); *The*

(1) 4 Wheat., 316.
(2) 1 C.L.R., 91.
(3) 232 U.S., 516.
(4) 9 Wheat., 738.

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Commonwealth v. *State of New South Wales* (1); *Owensboro National Bank* v. *Owensboro* (2).]

Leverrier K.C. (with him *Flannery*), for the Commonwealth intervening. Cheques on the Commonwealth Bank are not liable to State stamp duty on two grounds, first, because it is a tax upon the operation of a Commonwealth instrumentality, and, secondly, because the *Commonwealth Bank Act* being a law of the Commonwealth, the Queensland *Stamp Act* 1894, so far as it purports to tax such cheques, is inconsistent with the former Act and is to that extent invalid. The Commonwealth must incur debts in various parts of the Commonwealth, and in order to pay those debts it is necessary and proper that the Commonwealth should establish branches of the Treasury in different places, and it might authorize those branches to borrow money in order to pay those debts. The Commonwealth could, instead of establishing branches of the Treasury, establish extra-departmental agencies for the same purpose, and give them the same powers. If the Commonwealth Government provided certain forms to be filled in by lenders of money to the branches or agencies before repayment of their loans, it is clear that those forms would be Commonwealth instrumentalities, and would not be liable to State taxation. The form would be an instrumentality; and so would the transaction itself, and the giving and taking the form would be an operation of a Commonwealth instrumentality. The Commonwealth Bank is an agency of that kind in all its functions. The creation of the Bank is authorized by sec. 51 (XXXIX.) of the Constitution, being incidental to the finance powers of the Government. The power of the Bank to borrow money on current account is also an incidental power. The mention of State banking in sec. 51 (XIII.) shows that it was recognized that banks of this kind were for governmental purposes. The power of the Bank to borrow on current account is a function of great importance, and is appropriate for the purposes of government. In order that the Bank may borrow money on current account it must be ready to accept all money that is offered, so that the fact that more money is so borrowed than is necessary for

(1) 3 C.L.R., 807. (2) 173 U.S., 664.

governmental purposes does not render the Bank any the less a Commonwealth instrumentality. A tax on a cheque is a tax on the operations of the Bank, for a customer has not to pay the tax unless he resorts to the particular operation: *The Banks* v. *The Mayor* (1); *Tennant* v. *Union Bank of Canada* (2). Sec. 7 (*c*) of the *Commonwealth Bank Act* expressly gives power to the Bank to receive money on deposit on current account. A State could not prohibit the withdrawal of money deposited on current account with the Bank, nor can it put any restriction upon such withdrawal.

O'Sullivan (A.-G. for Queensland) and *Knox* K.C. (with them *Browne*), for the respondent. A bank or a person may become a Commonwealth instrumentality by having federal duties cast upon it or him by law, or may become a Commonwealth instrumentality by contract. The Commonwealth Bank is a Commonwealth instrumentality only by contract, and that quality extends only so far as the contract goes. Federal duties are by law cast upon national banks in the United States (*Van Allen* v. *The Assessors* (3)), including the duty of issuing notes. No federal duty is cast upon the Commonwealth Bank by the *Commonwealth Bank Act*, and by sec. 8 it is forbidden to issue notes. Any other bank would have immunity when performing federal duties. For instance, if a cheque were drawn upon an ordinary bank for federal purposes by a federal agent, it might be exempt from taxation. Under the *Commonwealth Bank Act* the only duties and powers conferred on the Bank are those of a general banking business. Assuming that the Bank is lawfully constituted, the functions of general banking business are not governmental functions, and the exemption of federal instrumentalities is limited to functions which are strictly governmental: *South Carolina* v. *United States* (4); *Federated Engine-Drivers and Firemen's Association of Australasia* v. *Broken Hill Proprietary Co. Ltd.* (5).

[ISAACS J. referred to *Flint* v. *Stone Tracy Co.* (6); *Vilas* v. *City of Manila* (7).]

(1) 7 Wall., 16.
(2) (1894) A.C., 31, at p. 46.
(3) 3 Wall., 573, at p. 589.
(4) 199 U.S., 437, at p. 456.
(5) 12 C.L.R., 398; 16 C.L.R., 245.
(6) 220 U.S., 108.
(7) 220 U.S., 345, at p. 356.

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In this case the tax is not on the Bank, but on the customer. General State laws apply to contracts of federal agencies unless they conflict with Commonwealth laws or impair the efficiency of the federal agency, or directly obstruct a governmental operation of the federal agency: *Railroad Co.* v. *Peniston* (1); *Davis* v. *Elmira Savings Bank* (2); *McClellan* v. *Chipman* (3); *Clement National Bank* v. *Vermont* (4). *D'Emden* v. *Pedder* (5) is not inconsistent with the rules laid down in those cases. If the appellant's view is correct the Constitution enables the Commonwealth to create a monopoly in itself of banking. The Commonwealth Parliament has power to create a corporation for the purpose of performing governmental functions, and to carry out its governmental functions in any way it thinks fit. But the Commonwealth has no power of any kind to enter into business to be carried on for profit. While the Commonwealth has power to appoint an agent to undertake functions of government it does not follow that it can empower that agent to enter into ordinary trading business for the benefit of the Commonwealth in such a way that persons dealing with the agent shall be free from the authority of the States. Here the Bank is not appointed to perform any governmental function. The only section of the *Commonwealth Bank Act* which could possibly involve any governmental function is sec. 30, which provides for the Commonwealth receiving portion of the profits. But the Commonwealth cannot enter into trade, being a body with enumerated powers. If it does, it must take the business as it finds it, that is, subject to the State laws. If the Commonwealth Bank is in some respects a government instrumentality the doctrine of immunity does not apply to cheques drawn on it by ordinary customers. Non-discriminating State legislation on matters within the sphere of the State's legislative power cannot in any relevant sense be said to amount to an interference with, or to impair the efficiency of, a Commonwealth instrumentality where such legislation does not impose a rule of conduct upon the instrumentality, but is directed to the conduct of other

(1) 18 Wall., 5, at p. 36.
(2) 161 U.S., 275, at p. 283.
(3) 164 U.S., 347, at p. 357.
(4) 231 U.S., 120, at p. 135.
(5) 1 C.L.R., 91.

persons in their transactions. It would be a misuse of language to describe the tax in this case as fettering, controlling or interfering with the free exercise of the executive power of the Commonwealth.

[They also referred to *Harrison Moore's Commonwealth of Australia*, 2nd ed., pp. 377, 435; *Barton* v. *Taylor* (1); *Baxter* v. *Commisssioners of Taxation (N.S.W.)* (2).]

Harry Stephen, in reply.

Cur. adv. vult.

The following judgments were read:—

Dec. 18.

GRIFFITH C.J. The appellant comes, supported by the Commonwealth, to maintain the proposition that the enforcement of the provisions of the Queensland *Stamp Act*, which imposes a stamp duty of 1d. on every inland bill of exchange payable on demand (which term includes a cheque on a banker) and imposes a penalty upon any person who issues such a bill of exchange not duly stamped, is an interference with the efficiency of an instrumentality of the Commonwealth, that is to say, the Commonwealth Bank, and therefore impliedly forbidden by the rule laid down by this Court in *D'Emden* v. *Pedder* (3), affirmed in *Deakin* v. *Webb* (4), and reaffirmed in *Baxter's Case* (5). That rule was expressed in these terms (6):—"When a State attempts to give to its legislative or executive authority an operation which, if valid, would fetter, control, or interfere with, the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent invalid and inoperative."

In order to bring the present case within that rule the appellant must establish (1) that the carrying on of the ordinary business of banking by the Commonwealth Bank is an exercise of the executive power of the Commonwealth, and (2) that, if it is, the requirement that cheques drawn upon a private account

(1) 11 App. Cas., 197.
(2) 4 C.L.R., 1087, at p. 1159.
(3) 1 C.L.R., 91.
(4) 1 C.L.R., 585.
(5) 4 C.L.R., 1087.
(6) 1 C.L.R., 91, at p. 111.

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shall be stamped is an interference with the freedom of that exercise.

The first subject of inquiry is, therefore, whether the Commonwealth Bank is in carrying on that business exercising a function of the executive Government of the Commonwealth. It may be conceded that the Commonwealth Parliament may for the more convenient exercise of any of the executive functions of government set up a corporation for the purposes of acting as an agent or instrumentality of government, as was done in the United States of America by the establishment of national banks (see *M'Culloch* v. *Maryland* (1) and *Osborn* v. *Bank of United States* (2)). This Court held in *The Jumbunna Case* (3) that a corporation might be created by the Commonwealth Parliament for analogous purposes. The Supreme Court of the United States pointed out, however, in *Osborn's Case* (2), that the privileges that could be claimed by such a corporation were no greater than if the same governmental functions had been entrusted to an executive officer of the Government. If that limitation is adopted, as it must be, the privilege that can be claimed in respect of a bill of exchange drawn on the Commonwealth Bank is no greater than can be claimed in respect of a bill of exchange drawn on the Commonwealth Treasurer by a creditor of the Commonwealth.

At this stage it is convenient to refer to the Act (No. 18 of 1911) by which the Commonwealth Bank is established, the provisions of which are in some respects remarkable. Sec. 5 declares or enacts that "a Commonwealth Bank, to be called the Commonwealth Bank of Australia, is hereby established." Sec. 6 enacts that it shall be a body corporate with perpetual succession and a common seal, and may hold land and may sue and be sued in its corporate name. This is all. There are no corporators. How there can be perpetual succession when there are no persons to succeed one another I do not quite understand. It is commonly said that a corporation aggregate is "a mere abstraction of law" "having a metaphysical existence only" (*Grant*). This is, of course, true in one sense, but has always been said of a fictitious entity composed of the aggregate of

(1) 4 Wheat., 316. (2) 9 Wheat., 738. (3) 6 C.L.R., 309.

several persons, and never of a mere disembodied spirit. I pass by the question whether in the nature of things it is competent for the Commonwealth Parliament to declare that such an abstraction disassociated from any material persons shall be regarded as a corporation, and will assume that it is, and that the Bank is a real entity cognizable by law. Probably the true effect of the Act is a declaration that the Commonwealth may itself carry on the business of banking under the name of the "Commonwealth Bank of Australia."

The question then arises, as in every case of an asserted exercise of legislative power, "Under what power conferred by the Constitution is the corporation created?" A power to incorporate banks is conferred by sec. 51 (XIII.), and I will assume that this power is sufficient to establish the legal existence of the corporation. The next question is as to the powers which the Parliament can confer upon such a corporation, and it may be conceded that a bank lawfully incorporated has *primâ facie* the ordinary powers of a bank.

But when we come to the further question, "How far can such a bank be made an instrumentality of the Government?" recourse must be had to pl. XXXIX., which confers power to make laws incidental to the execution of any power vested by the Constitution in the Government of the Commonwealth. The executive powers of the Commonwealth as well as its legislative powers are limited to those conferred by the Constitution itself. If the carrying on of ordinary banking business is not an executive function of the Commonwealth conferred by the Constitution the Parliament cannot confer that function upon its instrument, for the stream cannot rise above its source.

It may be conceded that it is a function of government to raise money by way of loan for governmental purposes and to make provision for the custody and management of the public funds, whether raised by taxation or loan, but it does not follow that it is a function of government to carry on a trade for the purpose of raising revenue. In my opinion the carrying on of ordinary banking business is not a function of the executive Government of the Commonwealth conferred by the Constitution. It may be that the carrying on of such a business is not unlawful

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in the sense of being forbidden by law, but the liberty to do so cannot be regarded as anything more than a permissive faculty, permitted only in the sense of not being prohibited by positive law. Such tacit permission cannot confer any right to restrict the States in the exercise of their legislative powers over all persons who in the like absence of prohibition engage in such enterprises. The faculty is, in truth, one which is common to all such persons.

For these reasons I am of opinion that the operations of the Commonwealth Bank, as between itself and its customers, are not the discharge of a function of the executive Government of the Commonwealth, and that no privileges can be claimed in respect of them.

As to the second point, it can only be maintained by attributing to the word "interfere," as used in the rule relied on, a meaning which has never been attributed to it either in the United States or in Australia—in other words, by laying down a new rule, which, so far from being founded on American decisions, has been emphatically repudiated by the Supreme Court of the United States. See particularly *Railroad Co.* v. *Peniston* (1).

In my opinion it is impossible to say that the operations of the Commonwealth Bank are fettered or interfered with in any rational sense by requiring the customers of the Commonwealth Bank to observe the same fiscal regulations as are imposed upon the customers of other banks.

For both reasons I think that the appeal should be dismissed.

BARTON J. The appellant, on information of the respondent, an inspector of stamps, was convicted, under sec. 26 of the Queensland *Stamp Act* 1894, of having signed a cheque liable to stamp duty but lacking the stamp. He was fined one shilling and ordered to pay costs *plus* the duty of one penny, and he appeals to this Court, contending that a cheque drawn by a customer of the Commonwealth Bank upon his current account in that Bank is free of duty notwithstanding the provisions of the Queensland Act.

(1) 85 U.S., 5, at p. 36.

The *Stamp Act* was in existence before Federation, and was passed seventeen years before the *Commonwealth Bank Act*, No. 18 of 1911. There is nothing in the Bank Act which can be said to deal expressly with the point. The Queensland Act is general in its operation, and the question whether the signatory of such a cheque is liable to pay the penny duty, or, in other words, whether he is liable to a fine for non-payment of it, rests entirely on implication.

The appellant and the intervenant urge that the Commonwealth Bank is in all its operations under the Statute an instrumentality of the Government of the Commonwealth; that it is indeed by its special constitution a department of the Commonwealth Government; that the tax on the cheque is a tax on the operations of that Bank in part of its general banking business, since the transaction evidenced by the cheque is a transaction of the Bank; that its general banking business is an essential and organic part of its functions given it by federal Statute, that is to say, of its functions as a Commonwealth department, in the sense that without such operations the capacity of the Bank to serve the main purpose of its creation would be seriously impaired if not destroyed.

Very many cases were cited, but those on which the appellant and the intervenant most relied were *M'Culloch* v. *Maryland* (1), *Osborn* v. *Bank of United States* (2), and *The Banks* v. *The Mayor* (3) so far as that case relates to the immunity from State taxation of certificates of indebtedness issued by the United States to creditors of the Government, for supplies furnished to it for carrying on national defence. Of course, many other authorities were strongly urged, but it was upon the reasoning of the Supreme Court in these cases, adopted and followed in many others, that the claim for immunity was rested.

The questions raised have been numerous and interesting, and among them were the questions whether the *Commonwealth Bank Act* rests on any express authority at all, such as secs. 51 (XIII.) and 51 (XXXIX.) of the Constitution; whether, apart from express authority, the executive powers of the Commonwealth did not

(1) 4 Wheat., 316.
(2) 9 Wheat., 738.
(3) 7 Wall., 16.

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warrant the creation of a bank as an instrument of the Treasury, whose general trading operations were so essential to its life as such an instrument, that they must be protected against State taxation; whether there was any distinction on the question of immunity between a State tax including operations by cheque on current account on any bank whatever, and one limited to such transactions with respect to the Commonwealth Bank alone; whether the immunity claimed was a means of defence of a Commonwealth instrumentality against interference, or merely a claim by one trading concern that it should have a preference in this respect over all other trading concerns on the mere ground that its trading purported to be authorized by a federal Statute.

It is not my purpose in this judgment to deal with any of those questions, for the simple reason that unless the tax objected to is a tax on the operations of the Bank all the questions I have stated may, though of course only for the purpose of argument, be conceded to admit only of answers favourable to the appellant and to the Commonwealth. But I must guard myself against the assumption that I think any of such answers ought to be favourable if the determination of such questions were vital to this case. It is only if the operations of the Bank are taxed that any of these questions arise; and I think that the subject of this taxation is not an operation of the Bank in any sense in which the American cases, if we accept their reasoning, declare the immunity of certain operations of federal instrumentalities from taxation.

In *M'Culloch* v. *Maryland* (1) the legislation complained of was an Act of a State legislature purporting to tax "All banks or branches thereof in the State of Maryland not chartered by the legislature," by requiring that notes issued by them should be on stamped paper. M'Culloch, the cashier, had violated this Act by issuing notes upon unstamped paper. In *Osborn* v. *Bank of United States* (2) the Statute complained of was passed by the legislature of Ohio "to levy and collect a tax from all banks, and individuals, and companies and associations of individuals, that may transact business in this State, without being allowed to do so by the laws thereof." The impost took the form of an annual tax

(1) 4 Wheat., 316. (2) 9 Wheat., 738.

on each office of discount and deposit of the Bank in Ohio. In each of these cases the State Statute was held unconstitutional so far as its effect was to impose a tax on a bank which had been made an instrumentality of the Government of the United States, and undoubtedly that was the effect. In *The Banks* v. *The Mayor* (1) the certificates of indebtedness held to be beyond the taxing power of the States were issued by the federal Government, and to tax them was held to be in effect the taxation of the express federal power to borrow money on the credit of the United States. There were other questions in that case with which we need not trouble ourselves. There are numerous other cases in the American reports which assert the same principle as these three. If the giving of this cheque were, in the sense connoted by the cases, an operation of the Bank which the State tax directly affected, then if it were established that the Commonwealth Bank was a federal instrumentality acting as such in respect of the particular transaction, the reasoning of the cases cited would cover this case, and the appellant and the Commonwealth could properly apply it in their support.

An ordinary cheque such as this upon money to the credit of a customer on account current is an inland bill of exchange payable on demand. It is a request to the banker, not indeed to pay out any part of the actual and specific moneys of the customer in the banker's hands, but to hand to the payee a specified portion of a debt with which the banker has credited the customer in consideration of moneys deposited with the former by the latter. Before the creditor can have the cheque cashed he must sign it, but before he does so it must be duly stamped (sec. 26). The Bank has nothing whatever to do with the stamping. It is the customer who must buy the duty stamp if he wants his order cashed, otherwise there is a penalty to be paid—not by the Bank, but by him. The Bank does not lose to the extent even of the penny. It is urged, however, that it is the operation that is taxed. In a sense that is true. But the contract out of which the credit balance arises is not touched. The tax relates to the customer's demand for part performance of that contract. That demand is certainly taxed, but the Bank's operation, namely, the part

(1) 7 Wall., 16.

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payment of the debt, is not hindered or touched in any way whatever. The whole burden falls on the ordinary citizen who has a credit in that Bank just as he might have one in any other. The drawing of the cheque, which involves the tax, is the operation of that citizen solely, and the Bank has no concern in it, save that it would have the use of more money if the cheque were not presented. I think, therefore, that the tax is not any operation of the Bank, and I also think that in any sense connected with any such transaction, it cannot possibly impair or affect the Bank as a federal instrumentality—if, indeed, it be one: *Railroad Co.* v. *Peniston* (1); *Clement National Bank* v. *Vermont* (2). The reasoning in the last named case would warrant a judgment, not only on the ground which I assign, but on much wider grounds, which, however, it would be superfluous to adduce at present. Even to the extent of those further grounds, the reasoning appears to me to have great weight.

The case of *D'Emden* v. *Pedder* (3) was strongly relied on against the tax. This case is not governed by that authority. There the State tax, a general one on receipts, was enforced against the appellant, an officer of a public department exclusively belonging to the Commonwealth, in respect of a receipt given by him to the paying officer of the Commonwealth for his salary, which receipt was necessary under the federal *Audit Act*. The learned Chief Justice has quoted the rule which the Court laid down in that case at p. 111. In accordance with that rule the Tasmanian stamp law was held to be not within the competence of the State legislature in so far as it could be held to tax such a receipt as was given in that case. The Court held that, if so construed, the Act was invalid and inoperative, because the stamp duty was a diminution *pro tanto* of the remuneration of a federal officer. It also held, again in accordance with the rule stated, that the Tasmanian Act, if held to tax such a receipt, would be an interference with the federal officer in the exercise of his duty, and would therefore be invalid. The Court went on to say that while the general words of the Act were wide enough to include such receipts, still the applying of the general words of a State

(1) 18 Wall., 5.

(2) 231 U.S., 120, especially at p. 125.

(3) 1 C.L.R., 91.

law to a federal officer, where the application of the law would be an infringement of the Constitution, seemed to the Court a violation of a clear principle of construction, which the Court cited from the judgment of *Cotton* L.J. in *Ex parte Blain* (1).

Here the application of the State law to a subject's action in issuing his cheque is a mere exercise by the State of what is called "police power." It cannot be said to be an infringement of the Constitution.

It is not necessary to emphasize further the very broad distinction between *D'Emden* v. *Pedder* (2) and this case.

I am clearly of opinion that the appeal must be dismissed.

The judgment of ISAACS, GAVAN DUFFY and RICH JJ. was read by

ISAACS J. The question is whether sec. 26 of the Queensland *Stamp Act* 1894 is enforceable against a private citizen of Queensland who signs a cheque upon the Commonwealth Bank of Australia in respect of a current account in that Bank.

The appellant contends that in such circumstances the provisions of the section are not enforceable on the ground that enforcement would amount to State interference with a Commonwealth operation, or alternatively would conflict with paramount Commonwealth legislation. That contention involves three steps, namely: (1) that the Commonwealth has power to establish an organism to carry on banking business either as representing the Commonwealth or otherwise under conditions which free its operations from any State interference; (2) that the Commonwealth Parliament has so created an organism, namely, the Commonwealth Bank of Australia; (3) that the enforcement of the section is an interference with the operations of the Bank.

In the view we take, it is not necessary to determine how far the first step is substantiated. Our silence on that point is not to be construed as evidencing any opinion one way or the other.

As to the second step, the matter depends entirely on the construction of the Act. And as different considerations might present themselves upon different sections, it is sufficient to state our opinion with regard to the only portion of the Act involved

(1) 12 Ch. D., 522, at p. 533. (2) 1 C.L.R., 91.

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in the present appeal. That part is contained in sec. 7, which enacts that "the Bank shall . . . have power . . . (*c*) to receive money on deposit, either for a fixed term or on current account."

We do not think the Act constitutes the Bank universally the agent of the Commonwealth in the sense necessary to make all its acts the acts of the Commonwealth itself—in other words Sovereign Acts. In respect of sub-sec. (*c*) of sec. 7, its personality is kept distinct from that of the Commonwealth. In respect of some of its functions and obligations, it may or may not be identified with the Commonwealth—a matter for possible future consideration.

Moreover, the Act does not either expressly or by necessary implication purport to forbid a State to require a customer of the Bank who draws a cheque upon his current account to affix a duty stamp before executing the instrument. What would be the legal force and effect of such a prohibition if made as under the power contained in sub-sec. XIII. of sec. 51 of the Constitution is a question included in the first step, which, as we have said, is a matter left undecided by this case.

The third step is not necessary to determine. But one thing appears to us clear. The respondent relied strongly on American authorities, substantially upon two, viz., the *National Bank* v. *Commonwealth* (1) and *Railroad Co.* v. *Peniston* (2). In the first case the expression relative to State action on federal operations is "interfere with or impair their efficiency," and in the second there is a phrase "direct obstruction to the exercise of federal powers."

The argument rested on these decisions was that unless the Court can see either that the interference "directly obstructs" the Commonwealth operations, or that after weighing the effect of the interference it "impairs the efficiency" of those operations, the State law must be held fully operative.

Now, this doctrine, so far as American law is concerned, has been recently entirely swept away by the case of *Farmers Bank* v. *Minnesota* (3), a unanimous judgment of the Supreme Court

(1) 9 Wall., 353, at p. 362.
(2) 18 Wall., 5, at p. 36.
(3) 232 U.S., 516, at pp. 525, 526.

of the United States delivered in February of this year. The Supreme Court of Minnesota acted upon the doctrine no doubt thinking itself bound by the words in the dicta referred to. But the United States Supreme Court put those expressions aside, and held that the rule affirmed by *Marshall* C.J. in *M'Culloch* v. *Maryland* (1) still stands unimpaired.

The rule, quoted *verbatim* in the recent case mentioned from the judgment of *Marshall* C.J. in *Weston* v. *City Council of Charleston* (2), is where a federal power is given "the grant of the power is incompatible with a restraining or controlling power, and the declaration of supremacy is a declaration that no such restraining or controlling power shall be exercised. The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burthen on the operations of government. It may be carried to an extent which shall arrest them entirely."

The Supreme Court proceeds to say that it is on this ground that United States bonds have always been held exempt from taxation and *e converso* State bonds are not taxable by the federal Government.

If, therefore, American doctrine is to be relied on, the test is whether the State action has any "sensible influence" upon the Commonwealth operation, not whether that operation is thereby "directly obstructed" or "impaired in efficiency."

Whether or not that is the true standard to apply to our own Constitution it is not necessary now to determine.

POWERS J. The appellant in this case—not a Commonwealth official—was convicted and fined for signing a cheque on his private current account in the Commonwealth Bank of Australia without having duly stamped the cheque in accordance with sec. 26 of the Queensland *Stamp Act* of 1894.

The question to be decided in this case is whether sec. 26 of

(1) 4 Wheat., 316. (2) 2 Pet., 449, at p. 468.

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the Queensland Stamp Act in question, which imposes a duty of one penny on every bill of exchange payable on demand (including cheques on bankers), if enforced against a customer of the Commonwealth Bank of Australia, would fetter, control or interfere with the free exercise of the legislative or executive power of the Commonwealth by fettering, controlling or interfering with an instrumentality of the Commonwealth, namely, the Commonwealth Bank of Australia.

The first question to decide is whether the Commonwealth Bank of Australia has, by the Act by which it is established (No. 18 of 1911), been made an instrumentality of the Government to carry out functions of government only or to carry out, so far as current accounts of ordinary customers are concerned, apart from the savings bank business, the ordinary business of a trading bank.

The Bank is, in my opinion, constituted by the Act a Commonwealth instrumentality to carry out savings bank business—a governmental function in Australia—and possibly other government business, but under sec. 7 (*c*) of the Act the power to receive deposits on current account in its trading banking business is only given to it as a trading bank, and not to carry out any governmental functions.

Several other important questions have been raised during the argument, but I do not think it necessary to express any opinion about them on this appeal.

It was not seriously contended that the Constitution gave the Commonwealth special power to establish an ordinary trading bank for profit, that is, a bank apart from one to carry out government functions, or that pl. XXXIX. of sec. 51 of the Constitution included any power to establish a bank except as one incidental to the execution of any power vested by the Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the federal judicature, or in any department or office of the Commonwealth.

Personally, I agree with the learned Chief Justice where he says (1) that "It may be conceded that the Commonwealth Parliament may for the more covenient exercise of any of the executive

(1) *Ante*, p. 392.

functions of government set up a corporation for the purposes of acting as an agent or instrumentality of government, as was done in the United States of America by the establishment of national banks." And I agree with all my colleagues that, under the special Act constituting the Commonwealth Bank of Australia, sec. 26 of the Queensland *Stamp Act*, if enforced against customers of the Bank keeping ordinary accounts and drawing cheques on their current accounts, is not an interference by the State with, or a fettering of, the free exercise of the proper functions of any duly constituted instrumentality of the Commonwealth.

I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors, for the appellant, *Atthow & McGregor.*

Solicitor, for the respondent, *T. W. McCawley*, Crown Solicitor for Queensland.

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

B. L.