[HIGH COURT OF AUSTRALIA.]

THE COMMONWEALTH . . . . PLAINTIFF;

AND

THE STATE OF NEW SOUTH WALES DEFENDANT.

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SYDNEY, *July* 31; *Aug.* 1, 2, 19.

Barton, Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ.

Constitutional Law—Disposal by Commonwealth of land—Transfer—Registration—Payment of stamp duty—Application of Statute to Commonwealth—Federal instrumentality—"Conveyance or transfer on sale of any property"—Lands Acquisition Act 1906-1916 (*No.* 13 *of* 1906—*No.* 12 *of* 1916), *sec.* 63—*Stamp Duties Act* 1898 (*N.S.W.*) (*No.* 27 *of* 1898), *secs.* 4, 23, *Second Schedule—Stamp Duties (Amendment) Act* 1904 (*N.S.W.*) (*No.* 24 *of* 1904), *sec.* 17 (1), *Second Schedule—Real Property Act* 1900 (*N.S.W.*) (*No.* 25 *of* 1900), *sec.* 39.

By sec. 4 of the *Stamp Duties Act* 1898 (N.S.W.) and the Second Schedule thereto a stamp duty is imposed upon instruments of transfer of land, and by sec. 23 it is provided that no unstamped instrument required by the Act to be stamped shall be registered or capable of being registered in any office.

The Commonwealth having, pursuant to the *Lands Acquisition Act* 1906, acquired land in New South Wales, and having procured itself to become registered proprietor of the land under the *Real Property Act* 1900 (N.S.W.), found that the land was not required for public purposes. It then agreed to reconvey the land to the persons from whom it had been acquired in consideration of those persons agreeing to waive any claim for compensation. It was a term of the agreement that the reconveyance should be free of cost to those persons. The Commonwealth thereupon presented a memorandum of transfer to the Commissioner for Stamp Duties with a request that it should be marked by him as exempt from taxation, it being admitted that unless it was so marked or unless the stamp duty was paid the Registrar-General would refuse to register the transfer. The Commissioner having refused to mark the memorandum of transfer as exempt, the Commonwealth paid the stamp duty imposed by the *Stamp Duties Act* 1898 (N.S.W.) under protest, and brought an action against the State of New South Wales to recover the amount of the duty so paid.

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Held, by *Barton*, *Higgins*, *Gavan Duffy* and *Powers* JJ. (*Isaacs* and *Rich* JJ. dissenting), that the duty so imposed was payable in respect of the memorandum of transfer, and that the Commonwealth was not entitled to recover.

The Commonwealth v. *The State of New South Wales*, 3 C.L.R., 807, and *D'Emden* v. *Pedder*, 1 C.L.R., 91, distinguished.

Heiner v. *Scott*, 19 C.L.R., 381, applied.

Per Higgins J.: A retransfer to the vendors in consideration of their waiving any claim for compensation is not a "conveyance or transfer *on sale* of any property" within the meaning of the Second Schedule to the *Stamp Duties Act* 1898.

SPECIAL Case.

In an action brought in the High Court by the Commonwealth against the State of New South Wales the parties concurred in stating the questions of law arising therein in the form of a special case for the opinion of the Full Court.

The special case, as amended at the hearing by adding thereto the second question, was substantially as follows:—

1. On 8th November 1916 His Excellency the Governor-General, in pursuance of the powers in that behalf conferred on him by sec. 63 (1) (*a*) of the *Lands Acquisition Act* 1906-1916, authorized the disposal of certain land which had been acquired under the said Act by the Commonwealth, and which was not required for any public purpose.

2. A notification under the hand of the Honourable King O'Malley, the then Minister of State for Home Affairs of the Commonwealth of Australia, of the granting of such authority as aforesaid was duly published in the *Commonwealth of Australia Gazette* on 16th November 1916.

3. A copy of the said notification is as follows: "Whereas the land more particularly described in the schedule hereunder was, by notification of acquisition, published in the *Commonwealth of Australia Gazette*, dated the twenty-fourth day of July, one thousand nine hundred and fifteen, acquired by the Commonwealth of Australia under the *Lands Acquisition Act* 1906, for postal purposes at Waverley, New South Wales; and whereas the said land is not now required for any public purpose, His Excellency the Governor-General in Council has approved of authority being granted for the disposal of such land by transferring the same to

the persons from whom the same was acquired, in consideration of such persons agreeing to waive any claim against the Commonwealth for compensation in respect of the acquisition thereof by the Commonwealth." (A description of the land referred to then followed.)

4. The persons referred to in the aforesaid notification as "the persons from whom the land was acquired" are Arthur Miles and Herbert Ernest Ross.

5. The said Arthur Miles and Herbert Ernest Ross having agreed to waive any claim against the Commonwealth for compensation in respect of the acquisition of the said land by the Commonwealth and to accept a reconveyance of the said lands to them in consideration of such waiver, a memorandum of transfer under the provisions of the *Real Property Act* 1900 of New South Wales, being an appropriate form of assurance applicable in the circumstances, was prepared by the Crown Solicitor for the Commonwealth. It was a term of the arrangement between the Commonwealth and the proposed transferees that such reconveyance should be made free of cost to the transferees.

6. By the said transfer the Commonwealth of Australia, being registered as the proprietor under the *Real Property Act* 1900 of the subject land free from encumbrances, purported to transfer in consideration of a nominal sum of ten shillings to the said Arthur Miles and Herbert Ernest Ross all the estate and interest of the Commonwealth of Australia as such registered proprietor in the land described in the schedule to the notification set out in par. 3 hereof.

7. The said transfer was on 11th April 1917 duly executed on behalf of the Commonwealth of Australia as transferor by being duly signed by the Solicitor-General of the Commonwealth in the exercise of the power conferred upon him in that behalf in pursuance of the *Solicitor-General Act* 1916.

8. The said transfer, as so executed, was on 20th April 1917 produced by the Crown Solicitor for the Commonwealth to the Commissioner for Stamp Duties under the *Stamp Duties Act* 1898 (N.S.W.) with a request that it should be marked by him as exempt from any duty imposed by that Act or any Acts amending

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that Act upon conveyances or transfers on sale of any property.

9. The land in question being under the provisions of the *Real Property Act* 1900 (N.S.W.), registration under the provisions of that Act is necessary in order that the transferees may obtain a registered title to the land. The aforesaid request that the transfer be marked as exempt from payment of stamp duty was made with a view to subsequently obtaining registration. It is admitted that the Registrar-General would decline to register the transfer unless it was either stamped, or marked exempt from payment of stamp duty, by the Commissioner. According to the practice of conveyancing in New South Wales, the preparation of the transfer, the payment of stamp duty and the carriage of the instrument through the Stamp Office and the Land Titles Office fall to the task of the transferee, at his own cost including the amount payable for stamp duty.

By sec. 17 (1) of the *Stamp Duties (Amendment) Act* 1904, it is provided that in the case of the instruments mentioned in Schedule II. to this Act, the following provision (*inter alia*) shall have effect: "(*c*) If any such instrument executed after the commencement of this Act is not duly stamped in conformity with the foregoing provisions of this section, the person in that behalf specified in the said Schedule shall be liable to a fine not exceeding twenty-five pounds." Schedule II. of the said Act provides that with reference to a memorandum of transfer under the *Real Property Act* the transferee shall be the person liable to the said penalty.

10. On 3rd May 1917 the Commissioner notified the Crown Solicitor for the Commonwealth that he was unable to mark the said transfer exempt from payment of stamp duty and claimed that stamp duty was payable in respect thereof, and subsequently assessed the duty at £6 10s., which was at the rate of ten shillings per centum on the value of the land, and remitted the fine for late stamping. It is admitted that the said amount is correct if stamp duty is payable in respect of the said transfer.

11. The sum so assessed was paid by the Commonwealth to the Commissioner under protest on 21st June 1917, and this action was brought to recover the same.

12. The plaintiff contends that the duty imposed by the *Stamp*

Duties Act 1898 (N.S.W.) or by any Act amending the same upon conveyances or transfers on sale of any property is not payable in respect of the said memorandum of transfer.

13. The defendant contends that the memorandum of transfer is liable to stamp duty under the aforesaid *Stamp Duties Act* of 1898, and the Acts amending the same.

14. The questions for the opinion of the Full Court are :—

(1) Is the duty imposed by the *Stamp Duties Act* 1898 (N.S.W.) or by any amendment thereof upon conveyances or transfers on sale of any property payable in respect of the said memorandum of transfer from the Commonwealth of Australia to Arthur Miles and Herbert Ernest Ross under the circumstances hereinbefore stated ?

(2) If not, is any duty payable in respect of the said memorandum of transfer under the said Acts ?

15. It is agreed between the parties that the Court shall be at liberty to direct judgment to be entered in the action for the plaintiff or defendant, and either with or without costs either of this special case or of the action or both, and to make such order and pronounce such declaration and give such relief as to the Court may seem proper.

Knox K.C. (with him *Bavin*), for the plaintiff. This case is concluded by *The Commonwealth* v. *The State of New South Wales* (1), for it was there held that the *Stamp Duties Act* 1898 did not impose any obligation upon the Commonwealth. The result of that decision is that an instrument to which the Commonwealth is a party is not within the scope of the *Stamp Duties Act*. It is immaterial whether the Commonwealth is transferor or transferee. It is the instrument which is taxed, and the reasons for holding that the *Stamp Duties Act* does not apply to a transfer where the Commonwealth is the transferee apply equally to a transfer where the Commonwealth is the transferor.

[ISAACS J. referred to *Commissioners of Stamps (Qd.)* v. *Wienholt* (2).]

(1) 3 C.L.R., 807.

(2) 20 C.L.R., 531.

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Where the Commonwealth has conveyed land to another, if it wishes to avail itself of the privileges for which a subject would under the *Stamp Duties Act* have to pay, it may do so without payment. A transferor of land may if he chooses tender the transfer for registration, and may insist on having it registered. A transferor may require the transfer to be registered for his own protection. The *Real Property Act* 1900 does not impose the duty of obtaining registration of a transfer upon any person, but assumes that the transferor may apply for registration. See secs. 41, 48 (2), 135.

[RICH J. referred to secs. 36 (2), 73, 97, 117.]

Sec. 23 of the *Stamp Duties Act* prohibiting the registration of an unstamped instrument cannot be supposed to have been intended to bind the State Crown, and *primâ facie* it cannot be supposed to bind the Commonwealth Crown.

[RICH J. referred to *Attorney-General for New South Wales* v. *Curator of Intestate Estates* (1).]

That Act was not intended to touch any operation of the Crown, whether in right of the State or of the Commonwealth or of the Empire, legitimately carried out in New South Wales. The second ground of the decision in *The Commonwealth* v. *The State of New South Wales* (2), namely, that the transfer was a Commonwealth instrumentality, also applies here. The power given to the Commonwealth to legislate as to the acquisition of land for public purposes included a power to legislate for matters which are usually dealt with in legislation on that subject, and sec. 63 of the *Lands Acquisition Act*, providing for the disposal of land which had been acquired and was found not to be required, is within the power. A transfer, being necessary for the effective disposal of the land, is a Commonwealth instrumentality, and if registration of the transfer is necessary or convenient for the disposal of the land the Commonwealth, being competent to procure it, is entitled to registration without payment of stamp duty. The authority of the Commonwealth to dispose of land not required for public purposes includes authority to do everything necessary to divest itself completely of any estate in the land.

(1) (1907) A.C., 519, at p. 523. (2) 3 C.L.R., 807.

Blacket K.C. (with him *Flannery*), for the defendant. The tax imposed by the *Stamp Duties Act* is not a tax upon the Commonwealth or upon a Commonwealth instrumentality, but is a tax upon the transfer in the hands of the transferees. The Commonwealth did not hold this land as Crown land, but it was merely the registered transferee of the land, and could not claim to have a grant of it. At the time the transfer from the Commonwealth to the original holders was handed over to them the whole transaction between them and the Commonwealth would be at an end. The act of disposing of the land would then be at an end. The transferees are the persons who are liable to pay the stamp duty (*Heiner* v. *Scott* (1)), and their liability arose at the time the transfer was completed. That liability is recognized by sec. 17 (1) of the *Stamp Duties* (*Amendment*) *Act* 1904. The mere fact that the transferees were purchasers from the Commonwealth does not relieve them, and the Commonwealth cannot assert any better right to exemption than the transferees have. The duty of the Commonwealth as transferee to get the transfer registered is recognized in *The Commonwealth* v. *The State of New South Wales* (2). The instrument of transfer was not a Commonwealth instrumentality, because in disposing of land not required for public purposes the Commonwealth is not exercising one of the stated or implied powers under the Constitution; it was carrying out not a governmental purpose but a trading or commercial purpose. The power of the Commonwealth is to acquire and hold land for purposes for which Parliament is given power to legislate by sec. 51 (XXXI.). As soon as the land ceases to be required for public purposes it is no longer within that power, and the act of disposing of the land is not within the constitutional power.

Knox K.C., in reply. If the first ground of the decision in *The Commonwealth* v. *The State of New South Wales* (3) stands, the Commonwealth must succeed here. In considering whether a State Act binds the Crown or not, the question is whether the Act was intended to bind subjects alone or the Crown and subjects.

(1) 19 C.L.R., 381, at p. 396. (2) 3 C.L.R., at pp. 813, 815.
(3) 3 C.L.R., 807.

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If it is decided that it was intended to bind subjects only, the Commonwealth cannot be said to be a subject.

Cur. adv. vult.

The following judgments were read :—

BARTON J. The Commonwealth has brought an action in this Court against the State of New South Wales to recover the sum of £6 10s. paid by the plaintiff to the State Commissioner for Stamp Duties under protest. The matter comes before us in the form of a special case. The Commonwealth having resumed certain land in New South Wales, which was found afterwards not to be required for any public purpose, the disposal of it was duly authorized by the Federal Government, and a notification of that authority was duly gazetted. That notification announced the grant of authority "for the disposal of such land by transferring the same to the persons from whom the same was acquired, in consideration of such persons agreeing to waive any claim against the Commonwealth for compensation" in respect of its original acquisition. Those persons, named respectively Miles and Ross, agreed to the waiver of compensation, which was the consideration for its restoration to them, and to accept a reconveyance accordingly under the provisions of the *Real Property Act*. This is agreed to be the appropriate form of assurance. The memorandum of transfer was prepared by the Crown Solicitor for the Commonwealth. The Commonwealth had previously, upon the acquisition, been registered as the proprietor. The expressed but not the real consideration for the transfer was the sum of ten shillings. The transfer was duly executed. The Commonwealth Crown Solicitor produced to the Commissioner this transfer with a request that he should mark it exempt from duty. By the *Stamp Duties Act* 1898, sec. 23, "no unstamped instrument required by this Act to be stamped shall be registered or capable of being registered in any Court or office." Any officer knowingly registering any such instrument or permitting it to be registered is liable to a penalty. The request that the transfer should be marked exempt from duty was made with a view to subsequently obtaining registration.

It is important to observe that according to the practice of conveyancing in New South Wales the preparation of the transfer, the payment of stamp duty, and the carriage of the instrument through the Stamp Office and the Land Titles Office admittedly fall to the task of the transferee at his own cost. The Commissioner informed the Commonwealth Crown Solicitor that he could not mark the transfer exempt, as he claimed that stamp duty was payable in respect thereof. The stamp duty was assessed by him at £6 10s., being ten shillings per centum on the value of the land. The Commonwealth paid the stamp duty, as already stated, under protest. The plaintiff contends that no stamp duty is payable in respect of the memorandum of transfer, and the defendant contends that the instrument is liable to duty.

Sec. 17 (1) of the *Stamp Duties (Amendment) Act* 1904 enacts that in the case of the instruments mentioned in Schedule II. the following provision (*inter alia*) shall have effect: "(*c*) If any such instrument executed after the commencement of this Act is not duly stamped in conformity with the foregoing provisions of this section, the person in that behalf specified in the said Schedule shall be liable to a fine not exceeding twenty-five pounds."

In the Second Schedule the person liable to penalty in the case of such an instrument as this, whether it be a "conveyance or transfer on sale" or a "conveyance of any other kind" is "the vendee or transferee," and it is not disputed that the transferees in this case are, if not vendees, transferees within the meaning of the Schedule.

The question for our opinion raised by the special case is whether the duty imposed by the *Stamp Duties Acts* is payable in respect of this memorandum of transfer under the circumstances stated. But a second question has been agreed on by counsel and added to the special case by leave, namely, whether any duty is payable under the said Acts in respect of the memorandum of transfer.

The parties agree that the Court shall be at liberty to direct that judgment be entered in the action for either party, and with or without costs either of the special case or of the action or both, and to make such order, pronounce such declaration, and give such relief as seems proper to the Court.

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The contention of the Commonwealth is that when the ordinary registered proprietor transfers he is entitled to present the transfer himself for registration, and, in order to be able to do so, he is entitled to pay the stamp duty. (It is true that the transferor is free to do this, but I take it that he need not do it. Normally, as the special case shows, it falls to the task of the transferee to do this, among other things, *at his own cost.*) But, counsel says, there is no stamp duty at all if the Commonwealth is the registered proprietor transferring; first, because sec. 23 of the *Stamp Duties Act* of 1898 does not bind the Commonwealth, and secondly, because, if that section purports to affect the Commonwealth, it purports to impose a tax on an instrumentality of the Commonwealth.

The case of *The Commonwealth* v. *The State of New South Wales* (1) is adduced. It is far from my purpose to impeach that unanimous decision. I joined in and adhere to it. But it was given in a case in which the Commonwealth was the transferee. The transfer belonged to it, just as here the transfer belongs to Miles and Ross. The contention in the present case is that where the Commonwealth is the party transferring, not merely the Commonwealth but the transferee is wholly exempt from duty; that a duty which normally must be paid by some party to the transfer is not payable by either where the Commonwealth is a party. Inferentially it becomes clear that the second is the question really to be answered, and that the Commonwealth comes into Court not to relieve itself of a burden, since it does not suffer any, but to relieve the new owner.

Now, though the tax is placed upon the instrument, it cannot be levied on the instrument in the same way that a land tax, for instance, is levied on land. A customs duty is nominally payable on the importation of the goods, but it cannot be payable until somebody imports them. So a stamp tax must be paid by some party, although it is payable by reason of the instrument. Who, then, is the person to pay? In this connection the statement in the special case as to the task of the transferee, and sec. 17 (1) (*c*) of the *Stamp Duties Act* of 1904 must be closely borne in mind. I am much disposed to believe that this provision of law was passed

(1) 3 C.L.R., 807.

in view of the practice of conveyancing, and that when it places the obligation on the transferee it gives legislative recognition to that practice as incidental to the acceptance of a transfer under the *Real Property Act*. There is no obligation on the transferor. The State Acts place no burden on him. He is entitled to have the transferee's task performed by that party, and payment of the duty is part of that task. The matter is carried no further in favour of the plaintiff by the notification giving power to dispose of the land. The only authority granted thereby is "for the disposal of such land by transferring the same to the persons from whom the same was acquired." When the transfer had been executed and, as I think we must infer, delivered, the authority was completely exercised, and I do not see that the Commonwealth had any further obligation to the transferee or to the law. That being so, the contention that the *Stamp Duties Acts* do not bind the Crown in the sense of the Commonwealth, although true, is beside the question. The contention that the tax is an attempt to burden an instrumentality of the Commonwealth cannot be supported, because there was no burden. When the Commonwealth had transferred, it had done all that it was called on to do. The rest lay with the transferees, and any agreement such as is stated at the end of par. 5 of the special case was a voluntary arrangement between the parties to the transfer, and it is not asserted that it can convert into a burden *attempted to be imposed by law* that which was previously no burden so far as the Commonwealth was concerned. It is relevant to both of the questions raised by the plaintiff that the operations of having the instrument stamped and of registering it are both operations of the transferees and not of the Commonwealth. On the question of burdening an instrumentality of the Government of the Commonwealth, I may be pardoned for referring to my judgment in the case of *Heiner* v. *Scott* (1). The principle there laid down seems to apply to this case. *D'Emden* v. *Pedder* (2) was cited. I cannot see that the facts bring the plaintiff's claim within that settled authority.

There is a further view, not inconsistent with the above, in which I think the defendant State is entitled to succeed. It seems to me that the payment by the Commonwealth may be taken to have been made by it as agent for the transferees. For when the transfer

(1) 19 C.L.R., at 397, 398. (2) 1 C.L.R., 91.

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was executed, not being in escrow, it must have been delivered, though the transferor obtained it for the purpose of getting it registered free of duty. The transferor did not succeed in that attempt. Then the sum was paid under protest. But as this transferor was under no obligation to pay, it either paid it voluntarily and cannot have it back from the State, or it paid it in the interest of, and for, the transferees, who could not have registration without payment. Notwithstanding the protest, that payment was made for the benefit of the transferees. The plaintiff therefore must look to them, and not to the defendant, in respect of the disbursement. I do not say whether the sum paid was the correct amount, for, as already intimated, I think it is the second question which embodies the real dispute. I therefore do not answer the first question.

My answer to the second question is as follows: Yes, by the transferees.

I think that judgment ought to be entered for the defendant State with costs.

ISAACS AND RICH JJ. The question is whether the amount of £6 10s. or any other sum was payable by the Commonwealth as stamp duty on the transfer referred to in the case stated "under the circumstances" therein stated. The circumstances are in effect these:—Certain land had been acquired compulsorily by the Commonwealth but not paid for. Finding it was not required, the Commonwealth desired to dispose of it, and in consideration of the waiver of any claim in respect of the land by the persons standing in place of the former owners, the Commonwealth agreed to transfer the land to them free of any cost to the transferees. The latter term was of course based on valuable consideration to the Commonwealth, was perfectly legal and honest, and the Commonwealth was at liberty to carry out its contract in any lawful way without being open to the imputation of evading the Statute in the obnoxious sense of that term: *Bullivant* v. *Attorney-General for Victoria* (1) and *Attorney-General* v. *Duke of Richmond and Gordon* (2). As Lord *Atkinson* said in the latter case (3), "every contract for value freely entered

(1) (1901) A.C., 196. (2) (1909) A.C., 466.
(3) (1909) A.C., at p. 477.

into must, in the absence of fraud, be held in contemplation of law to have been entered into for the benefit of each of the parties to it." No allegation of fraud is made, and no inference of fraud was suggested or can be drawn. It is evident further, according to *D'Emden* v. *Pedder* (1), that any attempt to hinder or impede the performance of a lawful contract of the Commonwealth is forbidden by the Constitution.

The Commonwealth, being the registered owner under the *Real Property Act*, prepared a transfer, and when it was duly executed by both parties took steps to register it. It was not stamped. It is admitted in the case that "the Registrar-General would decline to register the transfer unless it was either stamped, or marked exempt from payment of stamp duty, by the Commissioner." The Commonwealth then, in order to procure registration, was forced either (1) to have it marked exempt or (2) to pay the duty claimed. It requested the Commissioner for Stamp Duties to mark the transfer exempt, but this was refused. Then it compulsorily paid the duty under protest and obtained registration, and the question is whether, under those circumstances, it is entitled on long established principles to recover back the money as unlawfully demanded as the price of doing what the law required the Registrar-General to do without that payment.

One argument of the Commonwealth should be referred to *in limine*. It was that sec. 63 of the Commonwealth *Lands Acquisition Act* in itself includes the right to procure registration, and so overrides any State provision to the contrary. By that section the Governor-General is empowered to authorize the "disposal" of any land not so required, and then, says the section, "the land may be disposed of accordingly." Mr. *Knox* has argued that the expressions "disposal" and "disposed of" include the act of registration under the State Act. That is not their natural meaning, and particularly when used with reference to land, the title to which, as may happen, is already completely vested in the Commonwealth by force of the Act itself. Registration may in certain circumstances be necessary under the State law to complete the title of the purchaser, but "disposal" of the land as used in sec. 63 naturally

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

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means, for instance, sale or exchange or leasing. The section goes on to require a return of all land disposed of under its terms, showing the manner of its disposal; and, what is very important in this aspect, it requires the return to be made "within thirty days after the disposal" if Parliament is then sitting. The obvious meaning is that the thirty days begin to count, not from the time when the Registrar-General finds it convenient to enter a transfer in the Register, if transfer is the mode adopted, and the time may vary in the several States, but from the time when the bargain, as, for instance, for sale or exchange or leasing, is completed between the Commonwealth and the purchaser or lessee. A sale at auction would be an instance of disposal, though conveyance or transfer might not take place till later. A sale might be on terms extending over a period, with transfer of title at the end. Registration, even if attempted at once, might be delayed, for instance, by pending litigation, but the information Parliament requires means, in short, any effective parting with the interest in the land, and is not directed to conveyancing. We do not intend to convey any opinion that if sec. 63 had even expressly included registration the State would have been bound to exercise its governmental function of registering the transfer on any but its own terms. As the law stands we need not go further than the construction of the section itself. The question we have to answer must therefore be considered apart from any supposed authority conferred by sec. 63 to demand registration of a Commonwealth transfer to the purchasers. So considering it, we are referred to the two Acts—the *Real Property Act* and the *Stamp Duties Act*.

In this connection the starting point of the Commonwealth's argument in this case is the case of *The Commonwealth* v. *The State of New South Wales* (1). That case was decided on two grounds. The first ground was that, apart from any doctrine of constitutional law, the State *Stamp Duties Acts* did not, as a matter of construction, include a liability on the Commonwealth to pay duty before registering a transfer; and the second ground was that even if contrary to the true construction of the Acts they had purported to include such a

(1) 3 C.L.R., 807.

liability, they would have been to that extent inoperative as attempting to interfere with a Commonwealth instrumentality. Obviously the second ground was *obiter*, because directed to a situation which the first ground decided did not exist. We may, however, observe with reference to the second ground that it appears to us that the execution of a transfer by the Commonwealth and its delivery to the transferee—say, of a Commonwealth lease—to complete the change of title, cannot of itself end whatever character it possesses as an " instrumentality " so as to leave it taxable by the State before the Commonwealth purpose has been effectuated, and consequently while it has been instrumental in effecting nothing. If the State can tax the transfer at that stage because it is not a Commonwealth instrumentality, the State may deny any validity or force whatever to the transfer without being open to the charge of interference with the Commonwealth Government, and so prevent the title ever reaching the transferee, a result seriously affecting the value of the Commonwealth transaction. That would open many avenues of State action much wider than the hitherto decided cases have been thought to contemplate. It at all events presents a grave constitutional question which has not been argued, and which, as this case can be dealt with on the first ground of decision in the earlier case, need not be determined now.

The first ground of the earlier case, however, remains, and is not challenged. The learned Chief Justice in that case specifically refers to sec. 15 of the *Stamp Duties Act* 1898, providing that unstamped instruments shall not be given in evidence, and to sec. 23, that they shall not be registered in any Court or office. His Honor, after referring to the contention that the Acts " did affect the Crown," quoted his own words in *Roberts* v. *Ahern* (1) as laying down the wider rule, which is not limited to burdens of a pecuniary character, in these terms : " The modern sense of the rule, at any rate, is that the Executive Government of the State is not bound by Statute unless that intention is apparent." " Applying this rule," says his Honor, he comes to the conclusion that the Act imposed no obligation on the Commonwealth. In other words, the case decides that nothing in the *Stamp Duties Acts* can affect whatever right the Crown

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

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Isaacs J. Rich J.

otherwise possesses. To reiterate, for the sake of emphasis: sec. 23 of the *Stamps Act* 1898 cannot be used to prevent the Commonwealth registering a transfer which apart from the provisions of the *Stamp Duties Acts* it has the right to register.

In order to clear the ground, we at once state that if the registration by the Commonwealth were to be regarded in fact and in law a registration by the transferees, who are subjects, sec. 23 would of course apply to them, and the refusal of the Registrar-General to register without the stamping would be justified. But as that position is not accepted, and the registration is taken as a registration by and on behalf of the Commonwealth itself, we are distinctly of opinion that, unless the first ground of the former decision is wrong, the Commonwealth should succeed in this case.

It cannot be disputed by either party that the Commonwealth has a legal right to register the transfer. That is common ground. If not authorized by the *Real Property Act* the registration is void, and the transferees have no title. To deny that right would affect not the dutiability of the transfer, but the validity of the registration altogether. If, however, the Act authorizes a transferor to register a transfer (and it would be strange if at least in some cases it did not) we turn to that Act to see what its prohibitions are. Sec. 39 says: "The Registrar-General shall not register any instrument purporting to transfer or otherwise to deal with or affect any estate or interest in land under the provisions of this Act, except in the manner herein provided, nor unless such instrument be in accordance with the provisions hereof." The Crown, of course, is bound by that. If it seeks to obtain the registration provided by the Statute, it must take it on terms of the Act which it invokes. But apart from the *Stamp Duties Act* there is nothing else which can operate as a bar to the Commonwealth's right to register its transfer, and complete the divestiture of title, which may in easily conceivable cases be extremely important to the Commonwealth. But what provision in the *Stamp Duties Act* entitles the Registrar-General to refuse? Only sec. 23; which was specifically referred to by the Chief Justice in the earlier case, and was by his judgment included in common with the rest of the Act as not binding on the Commonwealth.

That view is well supported by the highest authority. The principle is affirmed in *Attorney-General for New South Wales* v. *Curator of Intestate Estates* (1) in a passage acted on by us in *Broken Hill Associated Smelters Proprietary Ltd.* v. *Collector of Imposts (Vict.)* (2). The principle is not simply that the Crown is not compelled to pay the tax, but that it is not deprived of any right it might otherwise have. The agreement it made with the transferees, that it would exercise its own rights in order to avoid the necessity of the transferees applying to register, cannot diminish whatever rights it possesses. No agreement *inter partes* can give a greater right to the State against the Commonwealth than it would otherwise have, or make applicable to the Commonwealth a statutory provision which does not otherwise apply to it. If the Commonwealth has the right to apply for registration, its own reasons or motives for exercising the right do not diminish it. We repeat that if the Commonwealth were the mere agent of the transferee, then in law it would be the transferee applying, but that was the very position agreed to be avoided.

These considerations, in our opinion, dispose of the case, and require the answer to the question submitted to be in the negative. But it is proper to refer to some of the arguments dwelt on by learned counsel to show that the instrument is dutiable, even when the Commonwealth is registering it.

It is in the first place conceded by the State of New South Wales that where the Commonwealth is transferee the instrument is not dutiable. We are not prepared to hold that even in such a case, if the transferor being an individual were to present it for registration, sec. 23 would not be operative. The State registration is something more than non-interference with rights. It confers title. It sometimes confers a better title than the transferor possessed. It provides, as the Privy Council said in *Gibbs* v. *Messer* (3), "that everyone who purchases, *in bonâ fide* and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the Register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title." If the State in doing this

(1) (1907) A.C., at p. 523. (2) 25 C.L.R., 61, at p. 66.
(3) (1891) A.C., 248, at p. 254.

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deprives another of any interest in the land, it compensates him, and for this purpose provides for an assurance fund. (See *Papworth* v. *Williams* (1).) It is therefore quite different from a transaction dependent for its result merely on the agreement and acts of the parties themselves. It is not the parties who effectively *transfer* the land, but it is the State that does so, and in certain cases more fully than the party could. In short, a transferee seeking registration of a transfer seeks State affirmance of his position. If it were the transferee here applying for registration, the question would be whether the State itself in its own governing capacity can be forced to act for the benefit of its own subject, except on the terms it fixes by the law as the consideration upon which it offers to perform that service. This principle is acknowledged in *The Commonwealth* v. *The State of New South Wales* (2)—as, for instance, per *O'Connor* J. at p. 811 (*in arguendo*), per *Griffith* C.J. at p. 815, and per *Barton* J. at p. 820. And in the case supposed, a very serious question would be whether the State, in declining to perform the service of registering and certifying to the purchaser's title except upon the terms authorized by Parliament, is in any way attempting to interfere with or prejudice a Commonwealth instrumentality.

We have pointed out some of the considerations for not assuming the immunity from sec. 23 of a transferor to the Commonwealth on presenting his transfer for registration, to indicate that in our minds the question is still open. But at least, since on the authority of *The Commonwealth* v. *The State of New South Wales* (2) sec. 23 does not bind the Crown, it is clear the Commonwealth's application for registration as transferee could not be refused under that section on the ground that the instrument was unstamped. Part of the argument to sustain this was that sec. 17 of the Act of 1904 showed that the duty was imposed on the transferee, and not on the transferor, and therefore as no duty is imposed on the transferor by the terms of the Act, and as the duty imposed on transferees does not bind the Crown, the instrument in such case was not dutiable at all. With great respect for any opinion to the contrary, we think that is demonstrably an error. The general principle of the *Stamp Duties*

(1) 20 N.S.W.L.R., 280; (1900) A.C., 563. (2) 3 C.L.R., 807.

Acts—for the Queensland Acts are cast in the same mould (though the penalties are more severe than in New South Wales, see sec. 26) —is stated in *Wienholt's Case* (1) in these words :. "It is by invalidating the instrument until the proper duty is paid." This is amplified in the judgment, but the principle so stated was in contradistinction to a personal liability to pay the duty as such, which was argued to exist, and which might have been invalid as beyond the competency of the Legislature to enact. The same consideration applies here. In the New South Wales Act sec. 9 requires the stamp to appear on the face of the instrument. That is undoubtedly what is called a tax on the instrument itself. But no person is made personally liable to pay the tax. Could the transferee be sued for it here ? Clearly not. But if a personal tax, why not ? And so far as he would be required to pay if he applied for registration, the answer is that it is conceded it is not the transferee who is applying.

The principle of *Wienholt's Case* (2) applies, and shows that the duty of affixing the stamp to the instrument is one of imperfect obligation. Certain sanctions are provided, as in secs. 14, 15, 16, 18 and 23 of the Principal Act and sec. 17 of the Act of 1904. But these cannot be applied to the Crown. It would be ridiculous to apply to the Crown in right of New South Wales the provisions of sec. 23 that it should not register a lease, if it thought fit to do so, because the lessee, having executed it, refused to pay the duty. It cannot be supposed, in the absence of express words, that a revenue Act makes a provision which declares that, because a subject did not pay a small fee on a lease, the Crown must sacrifice the greater right of obtaining rent. And if the section was originally thus confined to subjects, it does not affect the Crown in right of the Commonwealth. To hold otherwise is to run contrary to both the case of *The Commonwealth* v. *The State of New South Wales* (3) and *Roberts* v. *Ahern* (4).

But it is said that sec. 17 of the Act of 1904 shows the transferee, and the transferee only, is to pay the tax, and therefore the transferor cannot register unless the transferor pays it for the transferee.

(1) 20 C.L.R., at p. 542.
(2) 20 C.L.R., 531.
(3) 3 C.L.R., 807.
(4) 1 C.L.R., 406.

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The *sequitur* is difficult to appreciate. But is the primary proposition itself sound? Let us test it by its consequences. Sec. 17 does not say in so many words that the transferee is the proper person to put the stamp on the instrument when executed. If it did, the law would not be complied with if anyone else put on the stamp. That would be an unauthorized and insufficient attempt to comply with the law, on the assumption made. No man's legal obligation can be performed by another, unless as agent of the first. Sec. 17 imposes a new and different obligation on the transferee, arising at a different time, and not commensurate with the amount of stamp duty. It does not arise for two months after the New South Wales territorial jurisdiction attaches, and the amount is limited to a maximum of £25, whatever the amount of duty may be; and if he is fined the instrument still remains unstamped, and the question we are considering still remains for consideration. No doubt the penalty is to some extent a collateral but limited security that the document will be stamped within the time mentioned, but it does not affect the nature of the original enactment. The particular line in the Schedule is this: "Memorandum of transfer under *Real Property Act* . . . The transferee." Suppose the transfer is of a lease with onerous covenants, or of any instrument referred to in sec. 51 of the *Real Property Act*. Can it be that the *Stamp Duties Act* contemplates that it is only the transferee who is competent to affix the stamp? Or does it not mean that the instrument itself is declared dutiable irrespective of the persons interested, and that certain sections are collaterally enacted to secure that end? For instance, in the case of an instrument within sec. 51 above referred to, sec. 23 of the *Stamp Duties Act* is in ordinary cases a sufficient safeguard. But if the Crown is not bound by sec. 23, the section is no bar in that case. Take another line in the Schedule to the Act of 1904, viz.: "Lease . . . The lessee." Does it mean that the lessee only is the person taxed? If it does, and if it is sound law that the Commonwealth as transferor, as contradistinguished from transferee, is unable to register its transfer without paying the duty, then this consequence must follow. Under sec. 63 of the Federal *Lands Acquisition Act* it has power (*inter alia*) to lease land. It decides (say) to lease land at a

very advantageous rent. The lessee does not register, and the Commonwealth, though deeply interested in completing its title and making the transfer effective as a deed, must, according to the assumption, pay the duty which the lessee alone is liable to pay. It is difficult to conceive a more direct contradiction of the decision in *The Commonwealth* v. *The State of New South Wales* (1) in both branches. The matter by no means stops there. Another line in the Schedule is this: "Contract or agreement to sell, exchange, or transfer, a claim or lease . . . The proposed vendee or transferee." If the Commonwealth, as the proposed vendor or transferor, must see that the person mentioned in the Schedule pays the duty, and is to that extent bound by the sanctions in the *Stamp Duties Act*, it follows that sec. 15 would apply to forbid the document being (except in criminal proceedings) admissible in evidence or available or effectual for any purpose, whether at law or in equity, unless stamped by the Commonwealth and a fine paid.

These considerations appear to us to render it impossible to give to the Act of 1904 the revolutionary effect which the argument for the State seeks to attach to it. That effect would alter the nature of the tax, and convert it from a tax on instruments to a personal tax for the amount of which no person is made liable. Even if that extraordinary point be reached, the argument goes further and binds the Crown to pay a tax which another person is assumed to owe, before it can obtain recognition of its own rights. We are unable to acquiesce in that view. We think the whole question depends on whether the Commonwealth is bound by the *Stamp Duties Act* 1898, particularly sec. 23, and as the decision in *The Commonwealth* v. *The State of New South Wales* (1) is accepted by everybody as a correct basis, we are of opinion that the Commonwealth should succeed, and that the questions should be answered in the negative.

HIGGINS J. Certain land at Waverley, New South Wales, was acquired compulsorily by the Commonwealth for its public purposes under the *Lands Acquisition Act* 1906. In pursuance of sec. 20 of the Act, the notification was registered as if it were a conveyance

(1) 3 C.L.R., 807.

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on 31st July 1916, and the Commonwealth thereby became the registered proprietor. On 8th November 1916, as it was not further required for public purposes, the Governor-General, in pursuance of sec. 63, authorized the disposal of the land by transferring the same to Miles and Ross, from whom it had been acquired, in consideration of these persons agreeing to waive any claim for compensation for the acquisition. Miles and Ross agreed to accept a reconveyance on these terms, with a stipulation that the reconveyance should be made to them free of cost. A transfer was prepared in which the consideration was untruly stated as ten shillings, and it was executed. The Registrar-General would not register the transfer without payment of stamp duty, assessed at £6 10s. on the *ad valorem* basis of the New South Wales *Stamp Duties Act* 1898; the Commonwealth paid this sum under protest; the transfer was registered on 18th December 1917; and this action is brought by the Commonwealth to recover the £6 10s.

Under the *Stamp Duties Act*, sec. 4, there are to be levied for the use of His Majesty, for the consolidated revenue fund, certain duties in respect of instruments specified in the Second Schedule; and in the case of a "Conveyance or transfer *on sale* of any property . . . For every £100 and also for any fractional part of £100 of such amount or value . . . 10s." "Sale" involves "a price in money paid or promised"; "if any other consideration than money be given, it is not a sale. If goods be given in exchange for goods, it is a barter. So also goods may be given in consideration of work and labour done, or for rent, or for board and lodging, or any valuable consideration other than money; all of which are contracts for the transfer of the general and absolute property in the thing, but they are not sales" (*Benjamin on Sales*, 3rd ed., pp. 2, 3). Secs. 35 and 36 enlarge the meaning of "sale" for the purpose of the Act to the extent of including conveyances in consideration of stock or marketable or other security, or debts due, or conveyances subject to the payment or transfer of money or stock; but, except to this extent, "sale" must be read in its ordinary, technical meaning. Trustees empowered simply to "sell" must sell for a gross sum of money; for instance, a sale in consideration of a rent charge, or of an annuity, would be invalid (*Dart, Vendors and*

Purchasers, 6th ed., pp. 89, 90). The only question originally asked was whether "the duty imposed upon conveyances or transfers on sale" was payable in respect of this transfer; but this transfer was not a "conveyance or transfer on sale." There was no "sale" from the Commonwealth to Miles and Ross; there was a transfer in consideration of a waiver of all claims against the Commonwealth for the compulsory acquisition. By virtue of the acquisition Miles and Ross had a claim for compensation (sec. 17); and in determining the claim for compensation regard is to be had not only to the value of the land, but to the damage caused by severance, and the enhancement or depreciation of the value of any remaining land by reason of the carrying out of the public purpose (sec. 28). The amount of this "compensation"—not a debt, but damages—has never been assessed, and is not to be assessed. No one can point out any money price in the case of this transfer to Miles and Ross. The consideration of ten shillings as expressed in the transfer is simply untrue, in violation of the provisions of sec. 10, and it is our duty to act on the true consideration.

But, by consent of the parties at the hearing of the special case, the case has been amended by adding the question: "If not, is *any* duty payable in respect of the memorandum of transfer under the said Acts?" Conveyances other than "conveyances on sale" are, under the Act, subject to a fixed duty of £1.

The Commonwealth relies on the case of *The Commonwealth* v. *The State of New South Wales* (1), which I shall refer to as the *Paddington Case*. In that case, it was held that the Commonwealth was not liable to pay stamp duty under this Act on a transfer *to* the Commonwealth by agreement under sec. 14. Counsel for New South Wales do not impugn this decision, and I treat it as binding. Does the same principle apply to a transfer *by* the Commonwealth as applies to a transfer to the Commonwealth? It is admitted that the special stipulation with Miles and Ross that the reconveyance shall be made free of cost to them cannot affect the law here applicable; and I shall treat the matter as if the transferees had, as is usual, to bear the cost of registration and stamp duty. In effect, the question is: Is every instrument

(1) 3 C.L.R., 807.

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of conveyance to which the Commonwealth is the party of one part exempt from stamp duty?

The *Paddington Case* was decided on each of two independent grounds:—First, that the Act did not purport to bind the Crown expressly. It was said that it did not bind the Crown in its State capacity, and it was not disputed (see p. 814) that if it did not bind the Crown in its State capacity, it could not bind the Crown in its Commonwealth capacity, or the British Government or the Admiralty. The second ground was that to tax a transfer of land to the Commonwealth was to interfere with the executive functions of the Commonwealth, and, as such, was invalid under the doctrine of *D'Emden* v. *Pedder* (1). No one here impugns *D'Emden* v. *Pedder*. As for the first ground, I confess that if it were permissible I should like to reconsider both branches of the argument—both the construction of the *Stamp Duties Act*, and the corollary as to the Crown in its other capacities. There is certainly force in the argument that the New South Wales Government can hardly be meant to pay from its Treasury money that goes into the Treasury—that it cannot be expected to pay its own taxes. But this argument does not apply to the Crown in its other capacities; and it might fairly be urged that if the Commonwealth seek the aid of the State real property law for the purpose of getting a title under the law, it must submit to that law as a whole, including the charges incident to registration under that law. The Commonwealth can get the land without the aid of the New South Wales *Real Property Act*; for on publication in the *Gazette* the legal estate in the land becomes vested in the Commonwealth freed from all other interests (sec. 16). But, for purposes of dealing, registration under the State law is voluntarily sought; and the Commonwealth is, in effect, called on by the State to pay for services rendered by the State.

As for the second ground, to require the Commonwealth (if the Act does require it) to pay duty on the registration of a transfer from a subject to itself is, to the extent of the duty, to put a burden on the Commonwealth, to increase its expenditure, to interfere *pro tanto* with its operations for the fulfilment of its public purposes. But here we have a transfer by the Commonwealth to subjects of

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

the Crown; and, as we have to treat the matter as if the transferees had, as usual, to bear the cost of registration, including stamp duty, there is no such burden imposed by the Act on the Commonwealth, no such increase of expenditure, no such interference with the operations of the Commonwealth in the fulfilment of its public purposes. The burden is on the transferees, on subjects; and, but for the special arrangement as to costs, the Commonwealth does not bear the burden. Mr. *Knox* admits that the Commonwealth cannot, by agreement to pay the costs of transfer, make the transfer immune from duty if otherwise it would be subject to duty. So far as the operation of the State Act is concerned, the duty falls, in ordinary conveyancing practice, on the transferees.

It may be said, of course, that a burden even on the transferees in the way of stamp duty may reduce the purchase money or other consideration which transferees may be willing to give to the Commonwealth; that if in this case the burden is only £1, the State Parliament may increase the duty to £10,000; and that there cannot be any line drawn discriminating according to the weight of the interference. But in no case yet has the principle of *D'Emden* v. *Pedder* (1) been applied to interference of a character so indirect and remote as this. In *D'Emden* v. *Pedder* the interference was direct. The Commonwealth, without seeking the aid of the State law at all, wanted a receipt from its servant for its purposes of audit, and the State law said—or was treated by the State officials as saying —"You must put 1d. stamp on that receipt." The case of *Heiner* v. *Scott* (2) shows that the principle of *D'Emden* v. *Pedder* is not to be applied to all indirect and remote interferences. It was there held that the *Stamp Act* 1894 of Queensland, in imposing a stamp duty of 1d. on every cheque, and in imposing a penalty on any person who issues a cheque unstamped, was enforceable against a customer of the Commonwealth Bank who drew a cheque on his current account. As my brother *Barton* put it then, the tax fell, not on the Bank's operations, but on the operations of the customer. Yet indirectly, of course, the Commonwealth Bank's operations may be affected, to a greater or less extent according to the amount of the duty, by stamp duty on the cheque drawn on its accounts. In the

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

(2) 19 C.L.R., 381.

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recent case of *Farmers and Mechanics Savings Bank of Minneapolis* v. *Minnesota* (1) it was held that a State tax on bonds issued by a Federal instrumentality was invalid : " to tax the bonds as property in the hands of the holders is, in the last analysis, to impose a tax upon the right of the " Federal instrumentality " to issue them." Such a tax " must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract " (of borrowing) (2). But Federal officers, though their Federal salaries cannot be subjected to a State income tax, are subject to the laws of the State affecting their family and social relations, or affecting the acquisition and transfer of property, or their right to collect their debts, or their liability to be sued for debts (*National Bank* v. *Commonwealth* (3)) ; and yet such subjection to the State laws must, more or less, affect the arrangements made by the Federal Government with regard to its officers. The fact that Federal arrangements are indirectly affected by a property tax on its agents was dealt with in *Railroad Co.* v. *Peniston* (4). The Court said (5) :—" It cannot be that a State tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the Constitution. . . . Every tax levied by a State withdraws from the reach of Federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which Federal taxes may be laid." The tax was held to be valid (see also *Thomson* v. *Pacific Railroad* (6)). The reason is that these laws do not directly burden the Federal *operations* ; and, in my opinion, this stamp tax does not ; and the doctrine of *D'Emden* v. *Pedder* is not applicable to this case of a transfer from the Commonwealth to private persons.

The validity of sec. 63 of the *Lands Acquisition Act* is not questioned. The disposal of lands no longer required for the public purposes involves all acts of conveyance that are necessary or expedient to make the " disposal " complete. It is argued, indeed, by Mr. *Blacket* that though the acquisition of land is for a purpose

(1) 232 U.S., 516.
(2) 232 U.S., at p. 526.
(3) 9 Wall., 353.
(4) 18 Wall., 5.
(5) 18 Wall., at pp. 30-31.
(6) 9 Wall., 579.

of the Constitution—is an express function of the Commonwealth under the Constitution—the reselling of land is not, but that it is for a mere commercial purpose. I do not think that any such line of demarcation can be drawn. The power given by the Constitution is not "to acquire land"; it is to make laws "with respect to" the acquisition of land (for public purposes); and to make provision for the getting rid of land acquired which, as it turns out, is no longer required is, in my opinion, fairly within this power. It may also be treated as a "matter incidental," under sec. 51 (xxxix.). In these respects I should uphold the contention of the Commonwealth; and also its contention that the *Stamp Duties Act*, even taken with the amendment of 1904 (sec. 17 (1)), does not of itself throw on the transferee a direct obligation to pay the tax, but merely makes him liable to a fine if the transfer be not stamped within two months after execution, &c. But this case has to be decided as if there were no special arrangement as to costs of retransfer, and the exemption from liability for stamp duty must be the same if the instrument had been actually presented for registration by the transferee instead of the transferor. If presented by the transferee for registration, the stamp duty is not an obstacle to the disposal of the land by the Commonwealth. It is not a burden on any operation of the Commonwealth; it is, at the most, an obstacle to the transferee getting a certain kind of title from the State—it is a burden on the operations of the transferee. The operations of the Commonwealth are finished—so far as the law of conveyancing and the *Real Property Act* are concerned—as soon as the transfer, duly executed by the Commonwealth, is handed to the transferee. It seems that, under the *Real Property Act*, the transferor, as well as the transferee, is entitled, as between the transferor and the Registrar-General, to present the transfer and to demand registration. There may be some exceptional cases in which the transferee fails to present the transfer for registration, and the transferor desires, for some reason or other, to get the title out of his own name into the name of the transferee. In such cases the transferor would be entitled to call upon the transferee to pay the costs of registration, including the stamp duty. This is an obligation imposed by the relations of the parties in conveyancing practice.

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In short, the *Stamp Duties Act* does not put any tax whatever on the transferor; it leaves undisturbed the rule that, as between transferor and transferee, and in the absence of express contract to the contrary, the transferee has the burden of registration (including duty). The Commonwealth, having signed the transfer and given it to the transferee, has performed all its functions, and is a bare trustee for the transferee; from that time forward the transferee is to be treated as the beneficial owner of the land, the land is to be subject to State taxation as his property (*Wisconsin Central Railroad Co.* v. *Price County* (1)); and he must, in my opinion, pay such taxation as is incidental to the act of registering the transfer. The case just cited shows that the tax would not be treated as a burden on the Federal operations, although any tax on the land when acquired tends, more or less, to affect the market for the land. My answer to the questions in the exact form asked would, therefore, be in the negative to question 1, to question 2 in the affirmative. There should have been paid in respect of the instrument of transfer the sum of £1, as for a "Conveyance of any other kind not before charged," under the Second Schedule. But as some of my learned colleagues think it better to confine the answer of the Court to question 2, I am content to concur with them in that answer.

In coming to this conclusion it has not been necessary to consider the curious point which may sometime be raised as to the effect of the Commonwealth—the King in right of the Commonwealth—becoming tenant in fee simple of lands by virtue of a transfer from a proprietor in fee simple.

GAVAN DUFFY J. The case for the Commonwealth is put thus:—The registered proprietor who executes a memorandum of transfer is entitled himself to present it for registration, though according to the practice of conveyancing in New South Wales the preparation of the transfer, the payment of stamp duty and the carriage of the instrument through the Stamp Office and the Land Titles Office fall to the task of the transferee at his own cost, including the amount payable for stamp duty. Where the Commonwealth is such registered proprietor, the memorandum need not be stamped

(1) 133 U.S., 496.

for duty, first, because sec. 23 of the *Stamp Duties Act* 1898 does not affect the Commonwealth, and secondly, because if it purports to do so, it is an attempt to tax an instrumentality of the Commonwealth and therefore invalid; and *The Commonwealth* v. *The State of New South Wales* (1) is relied on as an authority for both these contentions. We have not been asked to overrule that case, and I express no opinion with respect to it; let it suffice to say that the defendant can succeed here without impugning its validity. In my opinion the effect of sec. 17 (1) of the *Stamp Duties (Amendment) Act* 1904, if not expressly to impose on the transferee the obligation of paying the stamp duty, is at least to recognize that in the case of a transfer of land under the *Real Property Act* such an obligation exists as between transferee and transferor according to the practice of conveyancing in New South Wales, unless the parties otherwise agree. If the parties do otherwise agree and by their agreement impose the obligation to pay on the transferor, it is the agreement and not the Statute which imposes it. If the transferee presents the memorandum, he must pay the duty before he can obtain registration; if the transferor desires to present it, he need not himself pay the duty, he is entitled to demand that the transferee shall pay it under his contract. The result is that even if it be conceded that the Commonwealth is entitled to present the memorandum of transfer for registration, and that the presentation may be regarded as the performance of a function under the Constitution which must not be hampered or impeded by State legislation, it is not, in fact, hampered or impeded by the operation of the *Stamp Duties Acts* within the meaning of the rule laid down in *D'Emden* v. *Pedder* (2) in these words: "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 *Attorney-General of Queensland* v. *Attorney-General of the Commonwealth* (3) the Chief Justice, who delivered the judgment of the Court in *D'Emden* v. *Pedder*, explained that the rule, being

(1) 3 C.L.R., 807.
(2) 1 C.L.R., at p. 111.
(3) 20 C.L.R., 148, at p. 163.

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based upon necessary implication, could not be extended beyond the necessity, and stated that the Court had so held in *Deakin* v. *Webb* (1). Can it be said as a matter of construction, that the parties to the Constitution must have intended that persons taking transfers of property from the Commonwealth under the provisions of the *Real Property Act*, should be exempt from the payment of the duty payable by other transferees? I think not. Applying to the present case the language of the Chief Justice in *Heiner* v. *Scott* (2), I would say that it is impossible to hold that the operations of the executive power of the Commonwealth are fettered or interfered with in any rational sense.

POWERS J. The question to be decided comes before us in a special case setting out the facts agreed to and the question of law submitted for the opinion of the Court. My learned brothers have referred at length to the facts set out in the case, and to the arguments advanced by counsel who appeared for the Commonwealth and for the State of New South Wales. The question of law submitted to the Court is: "Is the duty imposed by the *Stamp Duties Act* 1898 (N.S.W.) (No. 27 of 1898) or by any amendment thereof upon conveyances or transfers on sale of any property payable in respect of the said memorandum of transfer from the Commonwealth of Australia to Arthur Miles and Herbert Ernest Ross under the circumstances hereinbefore stated?" A question was raised as to whether the instrument of transfer referred to in the case was a conveyance or transfer *on sale*. As both parties were desirous of having the question decided as to whether any stamp duty was payable on the transfer, a further question was added, namely: "If not, is any duty payable in respect of the memorandum of transfer under the said Acts?"

The Commonwealth sued for the return of stamp duty paid on the instrument of transfer under protest. Counsel for the Commonwealth, in claiming a refund of the stamp duty, relied (1) on the case of *The Commonwealth* v. *The State of New South Wales* (3), in which it was held (*a*) that the *Stamp Duties Act* (N.S.W.) did not

(1) 1 C.L.R., 585. (2) 19 C.L.R., at p. 394.
(3) 3 C.L.R., 807.

impose any obligation upon the Commonwealth, (*b*) that an instrument of transfer of land to the Commonwealth was a necessary instrumentality of the Commonwealth for the acquisition of land for public purposes, and was therefore exempt from State taxation under the rule laid down in *D'Emden* v. *Pedder* (1); (2) on *D'Emden* v. *Pedder*, and other cases in which this Court adopted the principles laid down in that case.

I understood that one ground on which exemption from liability to duty was claimed by counsel for the Commonwealth was that the Commonwealth had a right, as a *transferor* under the authority to "dispose of" the land (apart from the special agreement referred to later on), to register the transfer as a Commonwealth "operation" so as to completely divest itself of title after transfer; and, because registration was necessary for that purpose, the transfer was exempt from duty on the principles laid down in *D'Emden* v. *Pedder* (1) and in *The Commonwealth* v. *The State of New South Wales* (2), previously referred to.

The facts set out in the special case, on which the Court has to decide the question submitted, do not, in my opinion, require the Court to decide the question referred to, for the following reasons: —The Commonwealth had acquired the property described in the transfer by "compulsory process" for public purposes in accordance with the provisions of the Commonwealth *Lands Acquisition Act* 1906. Immediately upon the compulsory acquisition of the land by the Commonwealth, the Commonwealth became liable to pay to the former owner compensation (sec. 26). Later on, and before the compensation was paid, it was discovered that the land was not required for public purposes, and in accordance with the provisions of the same Act (sec. 63) "His Excellency the Governor-General in Council has approved of authority being granted for the *disposal* of such land by *transferring the same* to the persons from whom the same was acquired, in consideration of such persons agreeing to waive any claim against the Commonwealth for compensation in respect of the acquisition thereof by the Commonwealth." Under sec. 63, where land is not required for any public purpose "the Governor-General may authorize the disposal of it as he thinks fit." The

(1) 1 C.L.R., 91. (2) 3 C.L.R., 807.

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authority given by the Governor in Council was a limited one, namely, to dispose of it " by transferring the land in consideration of the former owner releasing the Commonwealth from the existing claim for compensation." That authority would, I assume, include all that is incidental to that authority or is usual or is necessary to obtain the " release " referred to and to " transfer " the land. The release had been obtained, and all that a transferor could be required by the State, or by the purchaser, to do was done before stamp duty was paid on the transfer.

The duty was apparently paid by the Commonwealth on the transfer, not because it was usual for, or part of the duty of, a transferor to do so, or because of any duty imposed by any Act on the transferor, but because the Government, in addition to authority given by the Governor-General in the order mentioned, agreed not only to transfer the land but also to pay all the costs of the transfer and of registering it. That undertaking included the payment of duty (if any) payable under the *Stamp Duties Act* and the registration and other deed fees payable to the State by a purchaser of lands under the *Real Property Act* who desired to register his transfer. It was under that agreement, and not under the authority of the order of the Governor-General to transfer the land in the ordinary course, that the Commonwealth elected to pay the duty after the land had been disposed of by transfer in terms of the order. It was admitted that the fact that the Commonwealth had entered into the special agreement referred to could not affect the question as to whether duty was, or was not, payable on the transfer. It was, however, contended for the Commonwealth that the duty was not payable on the transfer whether the purchaser or the Commonwealth tendered it for registration. Even under the special agreement the Government was not compelled to register the transfer. Counsel for the Commonwealth said that the Crown Solicitor was probably employed to register the transfer to save paying the cost of the transferee's solicitor, and I think that is probably correct.

On the facts admitted I hold (1) that after the release referred to in the order had been executed and accepted by the Commonwealth and the transfer executed by the Commonwealth, and accepted by the transferee, the instrument of transfer—apart from the special

agreement—became the property of the transferee, a subject of the State, and as such liable to stamp duty; (2) that the instrument of transfer was presented to the Commissioner for Stamps on behalf of the transferee because the Commonwealth had unnecessarily agreed to pay all the expenses of preparing and registering the transfer for the transferee. In these circumstances, I think, for the reasons given by this Court in *Heiner v. Scott* (1), duty is payable on the instrument of transfer in question because the duty is payable, not on an operation of the Commonwealth (the transferor) but on the operation of the transferee (the person entitled to the transfer), which the Commonwealth Government thought fit to carry out.

Counsel for the State of New South Wales did not impugn the decisions in the cases of *The Commonwealth* v. *The State of New South Wales* (2) and *D'Emden* v. *Pedder* (3). The decisions are not challenged and I treat them as binding, but I agree with my learned brothers that, notwithstanding the decisions in those cases, duty is payable on the instrument of transfer in question.

As the majority of my learned brothers consider that the first question should not be answered, I concur in the proposed judgment.

First question not answered. Second question answered: Yes, by the transferee. Judgment for the defendant with costs.

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

Solicitor for the defendant, *J. V. Tillett*, Crown Solicitor for New South Wales.

B. L.

(1) 19 C.L.R., 381. (2) 3 C.L.R., 807. (3) 1 C.L.R., 91.