[HIGH COURT OF AUSTRALIA.]

WERRIN . . . . . PLAINTIFF;

AND

THE COMMONWEALTH AND ANOTHER . DEFENDANTS.

H. C. OF A. 1937-1938.

SYDNEY, 1937, *Dec.* 7.

MELBOURNE, 1938, *Feb.* 14.

Latham C.J., Rich, Starke, Dixon and McTiernan JJ

Sales Tax—Tax paid on sale of secondhand goods—Claim for refund—Voluntary payment—Mistake of law—Validity of Act—Sales Tax Procedure Act 1934-1935 (*No.* 53 *of* 1934—*No.* 12 *of* 1935), *sec.* 12A.

Constitutional Law (*Cth.*)—*Action against Commonwealth—The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 75.

Prior to the decision in *Deputy Federal Commissioner of Taxation* (*S.A.*) v. *Ellis & Clark Ltd.*, (1934) 52 C.L.R. 85, the plaintiff had paid, though with reluctance, sales tax on certain secondhand goods sold by him in 1931. In an action commenced in 1935 the plaintiff sought to recover from the Commonwealth and the Federal Commissioner of Taxation the money so paid as money unlawfully demanded and received by the commissioner as tax in respect of the sale of secondhand goods.

Held that judgment should be entered for the defendants:—

By *Latham* C.J. and *McTiernan* J., on the ground that the money was paid voluntarily under a mistake of law and, therefore, was irrecoverable.

By *Rich*, *Starke* and *Dixon* JJ., on the ground that the action was barred by sec. 12A of the *Sales Tax Procedure Act* 1934-1935, which was a valid enactment of the Commonwealth Parliament.

Per Rich and *Dixon* JJ.: Sec. 75 of the Constitution has not the effect of precluding the Commonwealth Parliament from exercising legislative control in respect of the existence of causes of action against the Commonwealth.

The Commonwealth v. *New South Wales*, (1923) 32 C.L.R. 200, explained.

CASE STATED.

In an action brought in the High Court by James Werrin against the Commonwealth of Australia and the Federal Commissioner of Taxation the parties concurred in stating, for the opinion of the Full Court, a case which was substantially as follows :—

1. Prior to and at the time of the execution of the agreement hereinafter referred to and until the completion of the purchase under the agreement the plaintiff, under the name of James Werrin & Co., carried on the business of a glass merchant and manufacturer at Newcastle in the State of New South Wales.

2. On or about 9th June 1931 a company styled James Werrin & Co. Ltd. (hereinafter called the company) was registered under the *Companies Act* of the State of New South Wales. The company appointed one Norman Oliver Whale to be its public officer for the purposes of the *Sales Tax Assessment Acts*.

3. By agreement bearing date 15th September 1931, made between the plaintiff and the company, the plaintiff sold to the company, for a certain consideration, £1,274 4s. 7d., mentioned in par. 1 (2) of the agreement, *inter alia*, certain plant, machinery, office furniture and equipment and tools of trade and a certain typewriter, motor-car and motor delivery truck, all of which were and had been used by the plaintiff in carrying on his before-mentioned business. The total consideration was to be satisfied as to the greater part by the issue of shares in the company, the balance of the consideration being met by the company paying off liabilities.

4. A certificate of registration under the provisions of the *Sales Tax Assessment Acts* 1930 as a manufacturer and wholesaler was issued to the company on 22nd July 1931.

5. Correspondence ensued between the company, or its public officer, and the Deputy Commissioner of Taxation. By letter bearing date 6th March 1933 the Deputy Commissioner informed the public officer that the terms under which the plant and assets were transferred to the company constituted a sale within the meaning of the *Sales Tax Assessment Acts* 1930-1932, and therefore sales tax was payable and must be paid. Further, that sales of secondhand goods (including plant) were subject to sales tax.

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6. On 19th March 1934 the plaintiff wrote to the Deputy Commissioner of Taxation a letter and forwarded to him therewith a sales-tax return in respect of the sale of plant, typewriter, office furniture, loose tools, motor-car and motor-truck, at a total sale price of £601 10s. and a cheque drawn upon the banking account of the company for the sum of £5 in part payment as or for sales tax calculated at six per cent and amounting to the sum of £36 1s. 9d. upon the sale.

7. On 9th May 1934 the Acting Deputy Commissioner of Taxation wrote to the company a letter wherein he requested that the balance of the sales tax, namely, £31 1s. 9d., together with 13s. 6d. additional tax for late lodgment of returns, be paid by five equal monthly instalments, the first instalment to be paid on or before 21st May 1934.

8. The said sum of £31 1s. 9d. was forwarded to the defendant Commissioner of Taxation by six several sums of £5 each on 15th May 1934, 12th June 1934, 9th July 1934, 2nd August 1934, 17th September 1934, 15th October 1934, respectively, the sum of £1 1s. 6d. on 30th October 1934, and the sum of 3d. on 1st April 1935. The said six several sums of £5 each and the said sum of £1 1s. 6d. formed parts of cheques drawn upon the banking account of the company which cheques were otherwise in payment of the sales tax payable in respect of sales by the company. The whole of the said sum of £36 1s. 9d. was paid by the Commissioner of Taxation to the credit of the Commonwealth public account at the Commonwealth Bank of Australia.

9. On 19th January 1935 the company wrote a letter to the Deputy Commissioner of Taxation wherein it stated that in view of the decision of the High Court in *Deputy Federal Commissioner of Taxation(S.A.)* v. *Ellis & Clark Ltd.* (1), that secondhand goods were not taxable, it requested a refund of the sum of £36 1s. 9d. paid as sales tax as set forth in pars. 6 and 8 hereof. By letter dated 13th February 1935 the Deputy Commissioner of Taxation replied that the effect of the decision of the High Court was that sales tax was not payable on and after 13th December 1934, and that as the sales tax herein had been paid prior to that date the company's claim for a refund thereof must be disallowed.

(1) (1934) 52 C.L.R. 85.

10. The company acted at all material times as agent for the plaintiff in relation to the payment of the said sum of £36 1s. 9d. and in relation to the aforesaid claim by the company for a refund of the amount so paid.

11. On 15th July 1935 one A. J. Goodwin, as agent for the plaintiff, wrote to the Acting Deputy Commissioner of Taxation a letter wherein an application was made for a refund of the said sum of £36 1s. 9d., as being tax incorrectly paid on the sale of secondhand goods, and it was stated that the tax paid by the plaintiff had not been passed on to the company. The claim for a refund was disallowed on 29th August 1935 by the Acting Deputy Commissioner of Taxation on the ground that the conditions of sec. 12A of the *Sales Tax Procedure Act* 1934-1935 had not been complied with, that is to say, "the tax was not paid within one month after the month in which the sale was made, nor was any request for further time to pay made within that month."

12. By writ issued on 13th September 1935 the plaintiff commenced this action against the defendants claiming the sum of £36 1s. 9d.

13. The question of law for the opinion of the Full Court is:

Is the plaintiff, in the circumstances set forth in the foregoing statement of facts, entitled to recover from the defendants or either of them the sum of £36 1s. 9d. ?

14. It is agreed between the parties that the court shall enter judgment in accordance with its decision on the question of law submitted herein with such order as to the costs of this special case and of this action as the court shall think fit.

Piddington K.C. (with him *O'Sullivan* and *Farrer*), for the plaintiff. The transaction was not a sale of goods, or, if it was, it was a sale of secondhand goods and thus exempt from payment of sales tax. The money was not paid voluntarily by the plaintiff and should be refunded to him as money illegally exacted, that is to say, extorted from him by pressure and duress. The provisions of sec. 12A of the *Sales Tax Procedure Act* 1934-1935 do not operate to prevent such a repayment. The money so paid by the plaintiff is recoverable by him as money had and received (*Moses* v. *Macferlan* (1); *Sinclair*

(1) (1760) 2 Burr. 1005, at pp. 1011, 1012; 97 E.R. 676, at pp. 680, 681.

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v. *Brougham* (1); *John* v. *Dodwell & Co.* (2); *Dominion Coal Co. Ltd.* v. *Maskinonge Steamship Co. Ltd.* (3)). With regard to a mistake of law or with regard to a mistake of fact equally the question is: What are the relations of the parties? If there is an illegal demand by a person who would have been able to enforce it if legal, and who proposes to enforce it, then the situation of the parties is not equal within the meaning of the cases which deal with voluntary payments and the money paid can be recovered (*Williams* v. *Hedley* (4); *Snowdon* v. *Davis* (5); *Smith* v. *Cuff* (6); *Martin* v. *Morgan* (7); *Dew* v. *Parsons* (8); *Morgan* v. *Palmer* (9); *Waterhouse* v. *Keen* (10); *Steele* v. *Williams* (11); *Piddington* v. *South Eastern Railway Co.* (12); *Great Western Railway Co.* v. *Sutton* (13); *Hooper* v. *Exeter Corporation* (14)). The principles, so far as the relations of the parties are concerned, are not affected by the decision in *Whiteley (Ltd.)* v. *The King* (15). That decision is the decision of a single judge and is contrary to all other decisions on this point; it was referred to in *T. and J. Brocklebank Ltd.* v. *The King* (16). Although the decision in *Brocklebank's Case* (17) was reversed on appeal (18), it was not overruled on the question of voluntary payment. *Ex aequo et bono* is the basis of a claim for money had and received (*Maskell* v. *Horner* (19)). The money was not paid voluntarily by the plaintiff but was extorted or obtained from him *colore officii* (*Attorney-General* v. *Wilts United Dairies Ltd.* (20); *Marshall Shipping Co.* v. *Board of Trade* (21)). The legislature has not by direct statutory means authorized the imposition of a tax on secondhand goods (*Attorney-General* v. *Wilts United Dairies*

(1) (1914) A.C. 398, at pp. 415, 417, 454, 455.
(2) (1918) A.C. 563, at pp. 571, 572.
(3) (1922) 2 K.B. 132, at p. 139.
(4) (1807) 8 East 378, at pp. 381-383; 103 E.R. 388, at pp. 389, 390.
(5) (1808) 1 Taunt. 359, at p. 363; 127 E.R. 872, at p. 874.
(6) (1817) 6 M. & S. 160, at p. 165; 105 E.R. 1203, at p. 1205.
(7) (1819) 1 Brod. & B. 289; 129 E.R. 734.
(8) (1819) 2 B. & Ald. 562, at pp. 565, 568; 106 E.R. 471, at pp. 472, 473.
(9) (1824) 2 B. & C. 729, at pp. 733-735, 737; 107 E.R. 554, at pp. 555-557.
(10) (1825) 4 B. & C. 200, at p. 208; 107 E.R. 1033, at pp. 1036, 1037.
(11) (1853) 8 Ex. 625, at p. 630; 155 E.R. 1502, at p. 1504.
(12) (1858) 5 C.B. N.S. 111, at p. 119; 141 E.R. 43, at p. 47.
(13) (1869) L.R. 4 H.L. 226, at p. 242.
(14) (1887) 56 L.J. Q.B. 457.
(15) (1909) 26 T.L.R. 19; 101 L.T. 741.
(16) (1924) 1 K.B. 647, at p. 653.
(17) (1924) 1 K.B. 647.
(18) (1925) 1 K.B. 52.
(19) (1915) 3 K.B. 106.
(20) (1921) 37 T.L.R. 884; (1922) 38 T.L.R. 781.
(21) (1923) 2 K.B. 343.

Ltd. (1); *The Commonwealth* v. *Colonial Combing, Spinning and Weaving Co. Ltd.* (2)). The principles enunciated in the foregoing cases apply *a fortiori* in taxation matters, and especially so when the demand for payment is made by an officer under the Crown. Sec. 12A of the *Sales Tax Procedure Act* 1934-1935 is invalid. It is an attempt to deprive a subject of money illegally extorted from him. The only constitutional way of achieving that objective is by a taxing Act retrospective in its operation. Regard should be had to the purpose of the Act (*R.* v. *Barger* (3)). Sec. 12A is a validating provision only; it is not a taxing provision within the meaning of secs. 51 and 55 of the Constitution. In the circumstances, property in the money paid by him, or, rather, the proper right thereto, remained in the plaintiff.

E. M. Mitchell K.C. (with him *Sugerman*), for the defendants. The money was paid voluntarily by the plaintiff (*Whiteley (Ltd.)* v. *The King* (4); *Sargood Bros.* v. *The Commonwealth* (5); *Smith* v. *William Charlick Ltd.* (6); *Cushen* v. *Hamilton Corporation* (7)). Threats of proceedings, either civil or criminal, do not constitute legal compulsion, and money paid under such threats cannot be recovered (*Maskell* v. *Horner* (8)). *Attorney-General* v. *Wilts United Dairies Ltd.* (9) and *The Commonwealth* v. *Colonial Combing, Spinning and Weaving Co. Ltd.* (2) were discussed in *Smith* v. *William Charlick Ltd.* (10). *Brocklebank Ltd.* v. *The King* (11) and *Marshal Shipping Co.* v. *Board of Trade* (12) were actions against the Crown which failed on the ground of statutory indemnity; and *National Pari-Mutuel Association Ltd.* v. *The King* (13), which, also, was an action against the Crown, failed on the ground that the money was paid by mistake of law and was not recoverable. Money paid in satisfaction of a claim made in supposed pursuance of a statute, when actually no claim exists, is a voluntary payment

(1) (1922) 38 T.L.R. 781.
(2) (1922) 31 C.L.R. 421.
(3) (1908) 6 C.L.R. 41, at pp. 73-75.
(4) (1909) 26 T.L.R. 19; 101 L.T. 741.
(5) (1910) 11 C.L.R. 258, at pp. 263, 276, 299, 303, 309.
(6) (1924) 34 C.L.R. 38.
(7) (1902) 4 Ont. L.R. 265.
(8) (1915) 3 K.B., at p. 121.
(9) (1921) 37 T.L.R. 884; (1922) 38 T.L.R. 781.
(10) (1924) 34 C.L.R., at p. 59.
(11) (1924) 1 K.B. 647; (1925) 1 K.B. 52.
(12) (1923) 2 K.B. 343.
(13) (1930) 47 T.L.R. 110.

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made by mistake of law and is irrecoverable (*Payne* v. *The Queen* (1); *Kelly* v. *The King* (2); *Melbourne Tramway and Omnibus Co. Ltd.* v. *Melbourne Corporation* (3); *R.* v. *Atkinson* (4); *Julian* v. *Auckland Corporation* (5)). This is not a case where a public officer demands an additional payment as the price of performing a duty to which the demandee is entitled as in *Morgan* v. *Palmer* (6), *Waterhouse* v. *Keen* (7), *Steele* v. *Williams* (8) and *Payne* v. *The Queen* (1). An action for money had and received is not appropriate in the circumstances of this case (*Sinclair* v. *Brougham* (9); *Holt* v. *Markham* (10); *In re Simms* (11)). Property in money paid voluntarily passes, on payment, from the person making the payment to the payee. Sec. 12A of the *Sales Tax Procedure Act* 1934-1935 is valid; it is justified under the "incidental power" conferred by sec. 51 (xxxix.) of the Constitution (*Le Mesurier* v. *Connor* (12)). The legislature, as it was entitled to do, merely defined the conditions under which moneys paid by mistake of law and otherwise irrecoverable will be refunded to the payers thereof (*Sargood Bros.* v. *The Commonwealth* (13)).

Piddington K.C., in reply. Sec. 12A of the *Sales Tax Procedure Act* 1934-1936, which purports to recognize, as having legal effect, rulings of the commissioner, is *ultra vires* of the Parliament (*British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (14); *New South Wales* v. *The Commonwealth* (15)). There never was a sale of the goods here in question; therefore sales tax was not payable and the money so paid should be refunded.

[*E. M. Mitchell* K.C., by leave, referred to *The Crown* v. *Bullfinch Pty. (W.A.) Ltd.* (16) and *J. C. Williamson's Tivoli Vaudeville Pty. Ltd.* v. *Federal Commissioner of Taxation* (17).]

Cur. adv. vult.

(1) (1901) 26 V.L.R. 705; 22 A.L.T. 143, 205.
(2) (1902) 27 V.L.R. 522; 23 A.L.T. 214.
(3) (1903) 28 V.L.R. 647; 24 A.L.T. 161.
(4) (1905) V.L.R. 698, at pp. 710 et seq.; 27 A.L.T. 86, at pp. 89 et seq.
(5) (1927) N.Z.L.R. 453; (1927) G.L.R. 359.
(6) (1824) 2 B. & C. 729; 107 E.R. 554.
(7) (1825) 4 B. & C. 200; 107 E.R. 1033.
(8) (1853) 8 Ex. 625; 155 E.R. 1502.
(9) (1914) A.C. 398.
(10) (1923) 1 K.B. 504, at p. 513.
(11) (1934) Ch. 1, at p. 20.
(12) (1929) 42 C.L.R. 481, at pp. 497 et seq.
(13) (1910) 11 C.L.R., at p. 303.
(14) (1925) 35 C.L.R. 422.
(15) (1915) 20 C.L.R. 54.
(16) (1912) 15 C.L.R. 443.
(17) (1929) 42 C.L.R. 452.

The following written judgments were delivered :—

LATHAM C.J. This is a special case stated in an action in which the plaintiff seeks to recover a sum paid by way of sales tax on secondhand goods.

The plaintiff sold certain secondhand goods to a company on 15th September 1931 and the Commissioner of Taxation claimed that he was liable to pay sales tax on the transaction. The plaintiff contended that the transaction was not a sale within the meaning of the Act and that he was not liable to pay. Ultimately, however, he paid, though with reluctance. At the time when the claim was made and when the commissioner required payment it was believed by the commissioner that sales tax was payable in respect of the sale value of secondhand goods. The plaintiff did not object to pay on the ground that the goods in question were secondhand goods. Subsequently, in *Deputy Federal Commissioner of Taxation (S.A.)* v. *Ellis & Clark Ltd.* (1), it was decided that sales tax was not payable in respect of sales of secondhand goods. The plaintiff alleges that he paid under compulsion and that he is entitled to recover the moneys paid in an action for money had and received.

The commissioner defends the action upon the grounds that the payment was a voluntary payment made under a mistake of law but not under any mistake of fact, and that sec. 12A of the *Sales Tax Procedure Act* 1934-1935 in any event provides an answer to the plaintiff's claim.

The general rule, as stated in *Leake* on *Contracts*, 6th ed. (1911), p. 63, is that money paid voluntarily, that is to say, without compulsion or extortion or undue influence and with a knowledge of all the facts, cannot be recovered although paid without any consideration. In this case there was no force or fraud or fear, or duress of goods or of person. There was not even a threat of ordinary legal proceedings to recover the amount alleged to be due, though if there had been a threat of such proceedings I do not think that would have affected the matter (See *Maskell* v. *Horner* (2), per *Rowlatt* J. (3), and per *Reading* L.C.J. (4)). The present

(1) (1934) 52 C.L.R. 85.
(2) (1915) 3 K.B. 106.
(3) (1915) 3 K.B., at p. 109.
(4) (1915) 3 K.B., at pp. 121, 122.

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is not a case where a person is entitled to the performance of a duty by a public officer and where the public officer insists upon receiving an additional payment as the price of performing his duty as in *Morgan* v. *Palmer* (1), or *Waterhouse* v. *Keen* (2), or *Steele* v. *Williams* (3), or *Payne* v. *The Queen* (4).

The case cannot, in my opinion, be distinguished from *Whiteley (Ltd.)* v. *The King* (5). In that case the plaintiff company sued for the recovery of amounts paid by way of duties demanded under the *Inland Revenue Act* 1869 which it had paid for several years in respect of certain male servants who were in its employment. The plaintiff had objected to pay and had paid only under protest, being told that in the opinion of the commissioner the duties were payable and that if they were not paid proceedings would be taken for penalties. At last, in the year 1906, the plaintiff refused to pay, and proceedings were taken which were ultimately decided in its favour. The plaintiff then claimed to recover the sums which it had paid in respect of duties for six prior years. *Walton* J. in a judgment which is much more fully reported in the *Law Times Reports* (6) than in the *Times Law Reports* (7) examined the whole question and decided against the plaintiff. He said : " There is no doubt as to the general rule stated in *Leake* on *Contracts* to which I have already referred, that money paid voluntarily—that is to say, without compulsion or extortion or undue influence, and, of course, I may add without any fraud on the part of the person to whom it is paid, and with knowledge of all the facts, though paid without any consideration, or in discharge of a claim not due, or a claim which might have been successfully resisted, cannot be recovered back. There is no doubt, and no question raised, that that is an accurate statement of the general rule. But, on the other hand, if the payment is not voluntary a different rule applies which may be stated, perhaps, as it is stated in *Leake* on *Contracts* (5th ed. (1906), p. 61), that money extorted by a person for doing what he is legally bound to do without payment, or for a duty which he fails to perform, may be

(1) (1824) 2 B. & C. 729 ; 107 E.R. 554.
(2) (1825) 4 B. & C., at p. 208 ; 107 E.R., at pp. 1033, 1034.
(3) (1853) 8 Ex. 625 ; 155 E.R. 1502.
(4) (1901) 26 V.L.R. 705 ; 22 A.L.T. 143, 205.
(5) (1909) 101 L.T. 741 ; 26 T.L.R. 19.
(6) (1909) 101 L.T. 741.
(7) (1909) 26 T.L.R. 19.

recovered back; as in the cases of illegal or excessive fees and payments extorted in the discharge of an office; and money paid under duress either of the person or of goods may be recovered back (pp. 58, 59). In all these cases the payment is not voluntary. The question which I have to decide here is whether the payments made during the years which I have mentioned—from 1900 to 1905—were or were not voluntary payments. Was there any duress here?" (1). The only suggested evidence of duress or compulsion of any kind was that the commissioner had demanded the duties and had threatened to take proceedings for penalties if they were not paid. The learned judge had no doubt that the facts did not show any compulsion or duress or extortion *colore officii*. The principles laid down in this case are, in my opinion, precisely applicable to the present case and they show that the plaintiff cannot succeed.

In another very similar and more recent case, namely, *National Pari-Mutuel Association Ltd.* v. *The King* (2), taxes had been paid by the plaintiff in the belief that they were properly payable. The House of Lords subsequently decided that tax was not payable in such a case as that of the plaintiff. The plaintiff failed in an action to recover moneys paid for the simple reason that the mistake which the plaintiff had made was one of law. In each of these cases the money was paid, as in the present case, to the Crown. In *Henderson* v. *Folkstone Waterworks Co.* (3) money was paid under mistake of law to a water company and the same principles were applied; the money, having been paid voluntarily, could not be recovered.

The principle appears to me to be quite clear that if a person, instead of contesting a claim, elects to pay money in order to discharge it, he cannot thereafter, because he finds out that he might have successfully contested the claim, recover the money which he so paid merely on the ground that he made a mistake of law. The same principles have been applied to similar cases in New Zealand in *Julian* v. *Auckland Corporation* (4) and in Canada in *Cushen* v. *Hamilton Corporation* (5), as well as in the Victorian cases

(1) (1909) 101 L.T., at p. 745.
(2) (1930) 47 T.L.R. 110.
(3) (1885) 1 T.L.R. 329.
(4) (1927) N.Z.L.R. 453; (1927) G.L.R. 359.
(5) (1902) 4 Ont. L.R. 265.

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which were cited in argument; I refer only to *Payne* v. *The Queen* (1) and *Kelly* v. *The King* (2). In my opinion these authorities are conclusive as against the plaintiff.

The respondents also rely upon the provisions of sec. 12A of the *Sales Tax Procedure Act* 1934-1935. This section prohibits the repayment by the commissioner of money paid as sales tax in circumstances such as exist in the present case and permits refund in the circumstances set out in the section. The validity of this section has been challenged, but as in my opinion the case can be decided upon general principles of law I do not think it necessary to consider this question.

The question in the case is as follows: "Is the plaintiff in the circumstances set forth in the foregoing statement of facts entitled to recover from the defendants or either of them the sum of thirty-six pounds one shilling and nine pence?"

This question should be answered: No. In accordance with the agreement of the parties set forth in the case judgment in the action should be entered for the defendants with costs of the special case and of the action.

RICH J. Even if it be assumed that the payments made on account of sales tax which the plaintiff seeks in this action to recover would in point of law form a debt due by the Crown to the plaintiff, as a taxpayer who had mistakenly complied with an unjustifiable demand for tax, it yet appears to me that the action must fail on the ground that it is barred by sec. 12A of the *Sales Tax Procedure Act* 1934-1935.

The assumption I have mentioned is perhaps a large one, but as I see no reason to doubt either the interpretation or the validity of sec. 12A, and as that section on its face appears to have been passed to meet the very case, I prefer to decide the case on that ground. Sec. 12A was passed after the decision in *Deputy Federal Commissioner of Taxation (S.A.)* v. *Ellis & Clark Ltd.* (3) in order to deal with the consequences of the decision. The court had declared that no sales tax was payable under the various *Sales Tax Assessment Acts*

(1) (1901) 26 V.L.R. 705; 22 A.L.T. 143, 205.

(2) (1902) 27 V.L.R., at p. 532; 23 A.L.T., at p. 215.

(3) (1934) 52 C.L.R. 85.

in respect of sales of goods which had previously gone into use or consumption, i.e., secondhand goods. The judgment was delivered on 13th December 1934. Sec. 12A enacts that where any person has paid any amount as or for sales tax in respect of any goods he shall not be entitled to any refund of the amount upon the ground that the goods have gone into use and consumption if the amount was paid before 13th December 1934. The payment sued for in the present case was made before that date. There is a proviso to the section within which the facts of this case do not fall. It is, therefore, unnecessary to mention it further. As to the interpretation of sec. 12A, I can see nothing to justify the view that it does not apply to the present case. The words " shall not be entitled to any refund of that amount " are not words of art, but they seem to me clearly to cover any right to repayment of the tax. The remaining words of the section are quite unambiguous. As to the validity of the section, I should have thought it was clearly within the competence of the Federal Parliament to say that a sum of money erroneously collected under a tax Act by administrative officers acting in good faith should be retained. There may be obligations or liabilities resulting in a money claim which have a constitutional basis, but, if there be such, this is not one of them. I do not think that anything which was said in *The Commonwealth* v. *New South Wales* (1) was intended to mean that sec. 75 of the Constitution produced the effect of establishing as constitutional rights incapable of legislative control causes of action to which subjects might become entitled under the general law against either Commonwealth or State.

In my opinion the question in the special case should be answered in the negative.

STARKE J. Special case stated by the parties for the opinion of this court upon the question whether the plaintiff is entitled to recover a sum of £36 1s. 9d. paid as and by way of sales tax.

The tax was paid in respect of the sale price of certain goods which, by agreement dated 15th September 1931, the plaintiff had sold to James Werrin & Co. Ltd., and was all paid before 13th

(1) (1923) 32 C.L.R. 200.

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December 1934, except a sum of three pence which was paid on 1st April 1935.

On 13th December 1934 this court held in *Deputy Federal Commissioner of Taxation* v. *Ellis & Clark Ltd.* (1) that sales tax was not payable on goods that had gone into use and consumption in Australia, e.g., secondhand goods. The goods which the plaintiff sold and upon which he paid tax had all been used in carrying on his business and in this way had gone into use and consumption. On 19th January 1935 the plaintiff, relying upon this decision, claimed a refund of the amount of the tax paid by him, and, upon refusal of the Commissioner of Taxation to accede to his claim, he, on 13th September 1935, commenced an action to recover the amount, and the special case is stated in this action.

But in the meantime the Parliament intervened and passed a *Sales Tax Procedure Act* 1935, which was assented to on 11th April 1935. It enacted by sec. 3 :—" After section twelve of the Principal Act the following section is inserted :—' 12A. (1) Notwithstanding the provisions of any *Sales Tax Assessment Act* (other than provisions relating to objections and appeals) or of any regulations made under any such Act, where any person has paid any amount either as sales tax or for sales tax in respect of any goods, by reason of any transaction, act or operation effected or done in relation to those goods, that person shall not be entitled to any refund of that amount—(*a*) if the amount was paid prior to the thirteenth day of December, One thousand nine hundred and thirty-four—upon any ground to the effect, expressly or impliedly, that those goods had gone into use or consumption in Australia prior to that transaction, act or operation . . . Provided that where any person has paid any amount either as sales tax or for sales tax by reason of the sale of any goods which prior to that sale had gone into use or consumption in Australia and the commissioner, upon the production of such evidence . . . as the commissioner considers sufficient, is satisfied—(*a*) that the amount was paid within one month after the close of the month in which the sale took place . . . and (*b*) that the amount has not been passed on by that person to the purchaser of the goods in the total sum paid by the purchaser to the

(1) (1934) 52 C.L.R. 85.

vendor in respect of the sale, the commissioner may refund to that person the amount so paid by him."

In my opinion the amount claimed by the plaintiff falls precisely within the terms of the section and is not recoverable if the section be valid. But the plaintiff insists that the section is beyond the power conferred upon Parliament by the Constitution. The Parliament has plenary powers to make laws for the peace, order and good government of the Commonwealth with respect to taxation but so as not to discriminate between States or parts of States and with respect to matters incidental to the execution of any powers vested by the Constitution in the Parliament. It is argued that the provision above set forth is not a law with respect to taxation or incidental thereto but a mere confiscation of the moneys of the subject in respect of which the Parliament cannot give to the Commonwealth immunity from suit (Constitution, secs. 51 (xxxi.) and 75). The prompt collection of revenue is of the utmost public importance both for the performance of the functions of government and the meeting of public liabilities. It would upset public finance unless some safeguards were provided against mistakes in assessment or the illegal exaction and collection of taxes. Generally a system is provided for the correction of such errors by appeal and so forth. It may be found in a board of review and an appeal to a court as in the present case (Cf. *Sales Tax Assessment Act* (*No.* 1,) 1930-1935, Part VII.). But Parliament is not so confined ; its power is plenary. Public mischief might easily result if taxpayers on some legal decision, which they might themselves have obtained if sufficiently alert, were allowed to reclaim taxes paid by them. It might be necessary, as in the present case, where apparently large sums of money were involved, to safeguard revenue that had been paid and collected and protect it in the manner prescribed by sec. 12A, and of that Parliament alone can judge.

But the provision, if not a tax, is, in my judgment, clearly a law with respect to taxation and within the competence of Parliament. In the view I take it is unnecessary to consider whether the argument on the part of the Commonwealth that a tax voluntarily paid cannot be recovered back is right or not. The Chief Justice has discussed

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the English cases, and a full citation of American authorities may be found in *Cooley* on *Taxation*, 3rd ed. (1903), pp. 1495 et seq.

The question stated should be answered in the negative.

DIXON J. The sums which the plaintiff seeks to recover in this action were paid to the Commissioner of Taxation before 13th December 1934 as and for sales tax in respect of goods. The ground upon which the plaintiff claims that he is entitled to repayment of such sums is that the goods had gone into use or consumption in Australia before the sale by reason of which the sums were paid as tax, and that he made the payments in circumstances entitling him to repayment. Sec. 12A of the *Sales Tax Procedure Act* 1934-1935 provides, in effect, that no one shall be entitled to a refund of payments made as sales tax on the ground that the goods had gone into use or consumption in Australia before the transaction, act or operation by reason of which the payments were made for sales tax, if the payments were made before 13th December 1934.

As a matter of interpretation I think this provision applies although the taxpayer seeking to recover the tax that he has mistakenly paid on secondhand goods is able to go further than the mere fact that the goods had gone into use or consumption in Australia and can show, in addition, circumstances which in a transaction between subject and subject would disentitle the payee to retain money paid under a mistake on the part of the payer as to the existence of a liability to pay.

The provision is framed upon the assumption that the mere payment of money as and for sales tax when no tax is in truth payable would or might, apart from statutory enactment, entitle the person paying it to have it refunded to him by the Commonwealth. In the view I take of this case it is unnecessary to consider the correctness of the assumption. For, in my opinion, sec. 12A intends to extinguish any right which the plaintiff might otherwise have to repayment, and he, therefore, cannot recover unless the provision is invalid ; and I think that it is clearly valid.

Probably more than one head of power may be relied upon as enough to enable the Commonwealth legislature to bar a liability otherwise resting upon the Crown in respect of tax mistakenly levied upon the

subject under the provisions of a taxing statute. But however this may be, I think that sec. 12A is clearly a law with respect to a matter incidental to the execution of a power vested by the Constitution in the government of the Commonwealth within the meaning of sec. 51 (xxxix.) of the Constitution. For the enforcement of the taxation laws, as of other laws, is the function of the government under sec. 61 and it is a matter incidental to that function or power to receive payments on account of tax including sums which, through some mistake of fact or law, are collected although not strictly payable. Unless, therefore, the Constitution contains some provision which fetters the power of the Federal Parliament to bar an existing cause of action against the Commonwealth, I should unhesitatingly say that sec. 12A was a valid enactment making the failure of the present action inevitable.

There is, I think, no constitutional provision preventing the Parliament from extinguishing a cause of action against the Commonwealth, unless implications be discovered in sec. 75 which do so. This action, or the right asserted in it, is a matter in which the Commonwealth is a party and, therefore, falls within the third paragraph of that section of the Constitution.

In *The Commonwealth* v. *New South Wales* (1), the joint judgment of *Isaacs*, *Rich* and *Starke* JJ. placed the decision of that case upon the ground that sec. 75 (iii.), in conferring original jurisdiction in all matters in which the Commonwealth is a party, enabled the Commonwealth to sue a State in tort without the aid of legislation under sec. 78 of the Constitution. The joint judgment regards sec. 78 as not being supplementary to sec. 75 but as enabling the Parliament in other matters within the judicial power, i.e., in matters within sec. 76, to do the same as sec. 75 does by its own force and also to give rights of suit in Federal courts other than the High Court (2). It would appear that the joint judgment decided that, in the kinds of matter which sec. 75 of the Constitution enumerates, that section, binding State and Commonwealth alike, imposed a liability in tort upon the Crown in either right and gave a means of enforcing it. This conclusion was founded upon the fact that the word "matters" includes actions of tort and that,

(1) (1923) 32 C.L.R. 200. (2) (1923) 32 C.L.R., at p. 213.

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upon the reasoning of *Farnell* v. *Bowman* (1), the creation of a jurisdiction to entertain such actions is enough to impose upon the Crown an effective liability. It is, of course, true that the word "matters" includes actions of contract as well as actions of tort, and logically it should follow that sec. 75 has the same operation in relation to liability *ex contractu*. If sec. 75, a constitutional provision, operates as a source of liability, it is not easy to see how parliamentary legislation could extinguish, qualify, or limit the liability thence arising. And the joint judgment contains two statements which together appear to show a recognition of this result. In one place their Honours say: "It is, of course, unthinkable that a State can defeat sec. 75 by declining to be liable for its torts against the Commonwealth or another State" (2). In another:—"The jurisdiction conferred by sec. 75 is beyond the power of the Parliament to affect. It can aid it and direct the method of its exercise; but it cannot diminish it" (3). It is, therefore, possible to argue that the reasoning on which their Honours' judgment proceeds involves the consequence that the delictual and contractual liability of the Commonwealth as well as, within Federal jurisdiction, of the States is imposed by sec. 75 of the Constitution and cannot be discharged, barred or otherwise affected by any law of the Parliament, as for example by an Act indemnifying the Crown. The actual decision arrived at in *The Commonwealth* v. *New South Wales* (4) may be justified and explained on either of two grounds, viz., (*a*) that the case came before the court upon motion to set aside the writ for want of jurisdiction and, therefore, no question of substantive liability arose, but only a question whether the court had jurisdiction to entertain the suit and determine the question of liability, a jurisdiction which it clearly had under sec. 75; (*b*) that the State of New South Wales had by legislation abandoned the immunity of the Crown for liability for tort, although, it is true, subject to and under a special procedure. *Knox* C.J. in his judgment scarcely went further than the first of these grounds, and *Higgins* J. based his judgment on the ground that sec. 58 of the *Judiciary Act* enabled

(1) (1887) 12 App. Cas. 643.
(2) (1923) 32 C.L.R., at p. 214.
(3) (1923) 32 C.L.R., at p. 216.
(4) (1923) 32 C.L.R. 200.

the Commonwealth as " a person " to sue a State in tort, an interpretation with which *Isaacs*, *Rich* and *Starke* JJ. disagreed. *Higgins* J. expressly held that sec. 75 " does not change the substantive law, it is a mere procedural " (i.e., jurisdictional) " section " (1). If it were not for the views expressed in the joint judgment, I should have felt little or no hesitation in saying that the Federal Parliament had complete authority over all ordinary causes of action against the Commonwealth and over the remedies for enforcing them. I should have thought that the right of the subject to recover from the Crown in right of the Commonwealth, whether in contract or in tort, is the creature of the law which the Federal Parliament controls. No doubt when a jurisdiction is conferred like that given by sec. 75 (iii.) and (iv.) the source whence the substantive law is to be derived for determining the duties of the governments presents difficulties; a matter which has received but little consideration except in the posthumous paper of the late Sir *Harrison Moore* (*Journal of Comparative Legislation*, vol. 17, p. 163). But I should not have thought that sec. 75 itself could be the source of the substantive liability.

Probably the joint judgment of *Isaacs*, *Rich* and *Starke* JJ. was not intended as a pronouncement that the liability of the State within Federal jurisdiction and of the Commonwealth was imposed directly by the Constitution so as to be unalterable and indestructible by legislation. It must be remembered that the question to which the material parts of the judgment are directed is the actionable liability of the Crown for tort and this is a subject upon which the distinction between procedure and substantive law has never been steadily maintained, at all events in the manner in which the Crown's immunity has been stated and explained. For one traditional mode of expressing and indeed accounting for the absence of any liability on the part of the Crown for the torts of its servants has been to say that the Crown cannot be sued except by its own consent and no fiat will be granted for a petition of right for tort. *Farnell* v. *Bowman* (2) is based upon the view that the grant of a general remedy against the Crown makes the torts committed on its behalf actionable. Implicit in this view appears to

(1) (1923) 32 C.L.R., at p. 217.

(2) (1887) 12 App. Cas. 643.

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be the assumption that the Crown's substantive responsibility existed in contemplation of law but had not been the subject of legal remedy. If this mode of reasoning is applied, it is easy to understand how sec. 75 should be considered enough to expose the State and the Commonwealth to a remedy for tortious liability. It treats the liability as already existing *in abstracto* as a duty of imperfect obligation and made perfect by the creation of a jurisdiction in which the Crown may be sued without its consent. But it would not mean that the substantive liability was itself created and imposed by the Constitution. At all events, I am not prepared to interpret the joint judgment as deciding that sec. 75 provides a source of substantive liability so that no Act of the Commonwealth Parliament can extinguish a cause of action which has accrued against the Commonwealth.

Accordingly I hold that sec. 12A of the *Sales Tax Procedure Act* 1934-1935 is a valid enactment.

In my opinion the question in the special case should be answered in the negative on the ground that sec. 12A bars the cause of action supposed and judgment should be entered for the defendants with costs including the costs of the special case.

McTIERNAN J. I agree that the special case should be answered: No.

The sums sued for, as the special case shows, were paid by the plaintiff upon the demand of the Commissioner of Taxation, who required the plaintiff to pay them as sales tax due by him in respect of the sale of secondhand goods although, as a decision of this court subsequently showed, secondhand goods were not within the scope of the *Sales Tax Acts* (*Deputy Federal Commissioner of Taxation (S.A.)* v. *Ellis & Clark Ltd.* (1)). The plaintiff was at liberty to refuse the demand. But he gave up his right to refuse to pay. The payment of the sums demanded has the character of a voluntary payment made by the plaintiff under a mistake of law about his liability to pay the sums. The decisions cited in the judgment of the Chief Justice, with whose reasons for answering the question in

(1) (1934) 52 C.L.R. 85.

the negative I agree, clearly show that the plaintiff cannot recover the money paid by him in these circumstances. It is also made clear that it is erroneous to regard the moneys sued for as moneys extorted from the plaintiff by the commissioner *colore officii*. In my opinion the plaintiff has no right of action to recover the moneys, and in this view it is unnecessary to determine by what, if any, of the legislative powers of the Commonwealth sec. 12A of the *Sales Tax Procedure Act* 1934-1935 may be supported.

Question in the special case answered: *No.*

Solicitor for the plaintiff, *P. F. Galvin.*

Solicitor for the defendants, *H. F. E. Whitlam,* Commonwealth Crown Solicitor.

J. B.