HIGH COURT OF AUSTRALIA

State of Tasmania

Vs.

Commonwealth of Australia

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

8th June 1904

Griffith, C.J.

The plaintiff State claims to be entitled to receive from the Commonwealth certain moneys collected by the Commonwealth in the period between 1st January, 1901, and 8th October, 1901 (from which date uniform duties were collected throughout the Commonwealth), in respect of customs duties on goods imported into Victoria and excise duties on goods manufactured in Victoria, both of which classes of goods passed, after the latter date, into the State of Tasmania for consumption. The plaintiff State rests its claim upon the provisions of sec. 93 of the *Constitution*. We are not concerned in this case with the question whether the Commonwealth authorities ought, on the passing of these goods from Victoria into Tasmania before the date when the Commonwealth *Customs Tariff* was actually assented to, to have collected duty upon them under the Tasmanian Customs Tariff, but the question is confined to moneys properly claimed by and paid to the Commonwealth authorities before uniform duties of customs were collected, and properly paid over monthly to the State of Victoria under the literal terms of sec. 89 of the *Constitution*. The claim is, therefore, in effect, that the State of Victoria shall repay from its treasury money which was rightly paid into it before the collection of uniform duties. The question is to be determined entirely upon the provisions of the Constitution dealing with the subject.

We were invited by Mr. Glynn to apply, in construing the Constitution, some higher rule of construction; to look beyond the letter of the Constitution; to adopt something which would commend itself to our minds as being a principle of abstract justice, and if possible to read the Constitution in conformity with that principle. Before stating the reasons which to my mind entirely dispose of the matter, I will refer to some rules which have been laid down for the interpretation of Acts of Parliament, for this Constitution is an Act of Parliament. It is said that the ordinary rules for construing Acts of Parliament do not apply to the Constitution. That proposition may be true in one sense, viz., that the Constitution is not a code going into minute details of the means by which the federation is to be carried into effect by the sovereign power created by it. There are many powers necessary to that end which are conferred—and one would expect them to be conferred—by necessary implication rather than in express words. It is, however, always a question of construction, whether we are called upon to construe the terms of a section, or to decide whether powers are necessarily to be implied in addition to those which are expressed. The same rules of interpretation apply that apply to any other written document. In any case the larger rules of construction sought to be invoked have no application to the present controversy.

I propose to refer to two authorities only as to the rules of construction. The first is a passage in the opinion of the Judges given to the House of Lords in the *Sussex Peerage Case*, (1844) 11 Cl. & F.,

85, at p. 143. Lord Chief Justice *Tindal*, delivering the opinion of the Judges, says:—"My Lords, the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the Statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such a case best declare the intention of the law-giver." The other passage I will read from the speech of Lord Selborne in *Hardy v. Fothergill*, (1888) 13 App. Cas., 351, at p. 358:—"It is not, I conceive, for your Lordships, or for any other Court, to decide such a question as this under the influence of considerations of policy, except so far as that policy may be apparent from, or at least consistent with, the language of the legislature in the Statute or Statutes upon which the question depends."

The first matter for consideration is, of course, in every case the subject-matter of the legislation. The subject-matter in this case is this:—Upon the union of the six States of Australia into one Commonwealth, difficulties were anticipated with respect to customs and excise duties. Each State had a different tariff, while it was intended that after federation there should be a single uniform tariff. It was recognised that it would necessarily take some time for the Federal Parliament to agree to a tariff and to pass it into law. In the meantime some temporary arrangement had to be made for collecting duties of customs and excise, and for disposing of the money when collected. It is a matter of history that various schemes were suggested for meeting these difficulties. Mr. Glynn referred to the proposal made in 1891, which, if adopted, would have given Tasmania exactly what he says his clients claim in this case. After that, other schemes were proposed, and finally the scheme was adopted which is found in the Constitution. It is manifest that whatever scheme was adopted was a purely arbitrary rule. One was finally adopted, and what that is is to be ascertained from the language of the Constitution, and all we have to do is to interpret that language. Some other scheme might have been adopted which some persons might think fairer, but that is a matter of opinion. The judges as to what was the fairest and best scheme were the people, by whom the Constitution was adopted, and the question is not one for our decision. We have merely to ascertain from the language used what was the scheme adopted, and to give effect to it. The scheme adopted by the Constitution was broadly this:—The period succeeding the establishment of the Commonwealth was divided into three periods. The first is described in sec. 89 as "until the imposition of uniform duties of customs." The second, commencing with the imposition of uniform duties, is divided into two parts. The first part is the first two years, and the other is the remainder of the first five years, a period which may be protracted indefinitely as Parliament may decide. For each of these periods positive provisions are laid down which we must construe. It was provided by the *Constitution* (secs. 86, 108), that on the establishment of the Commonwealth the State Tariff and Excise Acts should remain in force, but the duties levied under them were to be collected by the Commonwealth authorities. Then sec. 89 provided what was to be done with those duties when collected. [His Honor read the section and continued]. Stopping there, it appears that the Commonwealth was to credit to each State in the treasury books the revenues collected therein, debit each State with the expenditure incurred therein for the maintenance or continuance of departments transferred to the Commonwealth, and with the share of the State, according to its population, of the other expenditure of the Commonwealth, and to pay the balance in favour of each State into the treasury of that State month by month. That section, if there is no more in the Constitution, gave the State of Victoria an absolute vested right to receive the money now in question and to keep it. It is in order to get that money back out of the treasury of the State of Victoria that this action is brought. In order to succeed, it must be shown that the Constitution contains some provision either authorizing one State to sue another for money received under such circumstances, or requiring the Commonwealth to pay to the first mentioned State a corresponding

amount. The second period begins, as I just said, with the imposition of uniform duties of customs. Sec. 93, which must be read with sec. 89, covers the whole period, from the establishment of the Commonwealth to the end of the five years after the imposition of uniform duties, sec. 92 being a temporary provision for part of the latter period. Sec. 93 begins: "During the first five years after the imposition of uniform duties of customs, and thereafter until the Parliament otherwise provides"—which is equivalent to saying, "This shall be the law for the next period of five years." The section then continues: [His Honor read the rest of the section and continued]. Reading the second sub-section first, that provision amounts to this:—During the next five years the same rule is to be observed as before, that is to say, every State is to be credited with the customs and excise duties collected within its borders, with one exception, the exception being that contained in the first sub-section. It is contended for the plaintiff State that that exception or proviso is retrospective, and applies to goods imported into a State before the period when this law was to come into operation. It is a general rule of construction that *primâ facie* a law is read as speaking of what is to happen after it comes into operation, and that rule is just as applicable to a Constitution which makes provision for several successive periods of time as to a single law which comes into operation on its passing or on some prescribed day. Mr. Glynn contends that the term "the duties of customs chargeable on goods imported into a State" includes the duties of customs collected before the period during which this provision operates, and which had properly been paid to or received by the treasury of the State of Victoria. He says, and truly, that it can be predicated of the goods in question which were received into Victoria during the first period that they are "goods imported into a State," and that it can also be predicated of the same goods that they afterwards passed into another State for consumption. Therefore, he says, both those terms can be predicated of the goods in question, and the duties paid on them fall within the section. It is necessary, first, to see whether that is the natural construction of the section, and, if not, whether it is a possible construction and one which, for other cogent reasons, we ought to adopt. *Primâ facie* the section is prospective and speaks of something which is to happen in the future. The duty imposed by it on the Commonwealth is to be performed from time to time, but it begins at the second period. Is there, then, anything in the words to divest the State of Victoria of its right to retain the money which has already been properly and lawfully received by it? Certainly there are no express words to that effect. Then look at the provision itself. It is not a provision that money is to be refunded by one State to another, or that money is to be paid by the Commonwealth to a State. It is merely a matter of book-keeping. When the time comes for making a credit in favour of a State, that is the method in which it is to be done. But the crediting is to be provisional only, because if the goods afterwards pass into another State the duties are to be deemed to have been collected in the latter State. The crediting in sec. 89, however, is absolute. How then can this direction for a provisional crediting be implied as a qualification upon the absolute crediting prescribed by sec. 89, so as to divest a State of a right given by clear words?

Again, the provision is that the duties "shall be taken to have been collected" in the State into which the goods have passed for consumption. That seems to assume that they could have been collected in that State, although in fact they were collected in another. For the period after uniform duties had been imposed that is a perfectly natural provision. It does not matter where the duties are collected, for the same amount will be collected. But, if the retrospective construction is adopted, we should have the singular result that the fiction would be extended to this length—that, where duty could not lawfully have been collected in a State, it should nevertheless be deemed to have been collected in that State. The tariffs were different in the different States. There may have been and, indeed, were, cases where goods which were taxed in Victoria were free in Tasmania. If so, the singular result would ensue that duties would be directed to be taken to have been collected in a place where by law they could not have been collected. That is, to say the least, not a natural construction.

Another argument of Mr. Glynn was founded upon the fact that, before the establishment of uniform duties, there was a law in each of the States whereby drawbacks could be claimed by merchants on goods which had been imported and were afterwards exported, and that to give the section the interpretation he supports would be only to carry out that provision in another way. But that is not so. The drawback was given to the importer on exportation of the goods, if he asked for it. What Mr. Glynn contends for is that the drawback should not be refunded to the importer but paid to another State. In the case of goods imported into Victoria, on which duty had lawfully been paid, and which afterwards were transferred to Tasmania, where no duty was payable, he asks that drawback should be paid not to the importer but to the treasury of Tasmania, which would certainly be a singular result of the application of the practice of drawback.

Again, sec. 93 applies equally to excise as to customs duties, but there was never any provision in Victoria as to drawbacks in respect of excise duties. This result would follow—that the State having collected excise duties on goods, which duties had not been and could not be required to be repaid, would be required to refund these duties, and not to the person who had paid them, but to another State into which the goods afterwards passed for consumption.

All these considerations, so far from suggesting that the construction of the section as applying only to goods imported into a State after the imposition of uniform duties is wrong, tend to show that it is the right and necessary construction.

There is still another argument of some weight. The maxim *Expressio unius est exclusio alterius* is one which should be applied with caution, but often affords assistance in matters of construction. Now, the Constitution makes express provision for the case of some goods imported into a State before the imposition of uniform duties, and afterwards passing into another State for consumption. It is provided by sec. 92 that during the first two years after the imposition of uniform duties, if goods which have been imported into a State before that period, and on which duty has been paid at a lower rate than that prescribed under the Commonwealth tariff, pass into another State for consumption, the difference between the two amounts is to be collected and credited to the latter State. The matter, therefore, was present to the minds of the framers of the Constitution, and they made express provision for one case, viz., where the duty collected was less than the duty imposed by the Commonwealth tariff, and they did so for the period of two years only. But they made no express provision for cases where the duty collected was equal to or greater than the duty imposed by that tariff. These cases were left to the general governing provision of sec. 92, that "on the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free." Reading, then, sec. 89, the provision for crediting each State with the duties collected in it, with the provision in sec. 92 as to what is to happen during the first two years of the period following the imposition of uniform duties, we find that, up to the imposition of uniform duties of customs, all duties collected in any State are to be credited to that State, and that if, within two years after the imposition of uniform duties, goods on which duty has been so collected and credited are transferred to another State, then, if the duties collected are less than the duties imposed by the Commonwealth tariff, the difference is to be collected and credited to that other State. But nothing is said, so far, as to the duties already collected and credited in respect of the goods. Then follows the provision of sec. 93 that during the first five years after the imposition of uniform duties, duties chargeable on goods imported into a State and afterwards passing into another State for consumption are to be taken to have been collected in the latter State. In my judgment, that provision, according to its literal construction, and especially when read with the immediately preceding provisions, applies to the future, and relates only to goods imported into a State after the imposition of uniform duties, that is,

during the period of five years or more after that imposition.

Some argument was founded upon the word "chargeable." It is used three times in this chapter of the Constitution, viz., in secs. 92, 93 and 95. In sec. 92 it clearly means "prescribed by law to be paid on the importation of goods of that class." In sec. 95 it clearly means "prescribed by the law of Western Australia to be paid on such goods on importation." Why then should the word not have the same meaning in sec. 93? If these words be substituted for the word "chargeable" the section would read thus—"The duties of customs prescribed by law to be paid on goods imported into a State and afterwards passing into another State for consumption, shall be taken to have been collected in the latter State." The provision, of course, only applies to duties collected by the Commonwealth. But, when the Constitution in laying down a rule which is to be in operation during a future period speaks of duties "prescribed by law to be paid," I take it that the natural construction of those words is, that it refers to duties prescribed by the law in force during the period in question and not to duties prescribed by a previous and expired law.

For all these reasons I think the intention is clear. I have dealt with the arguments at length, and in some detail in compliment to the ability and evident sincerity with which they were urged, and to the Government of Tasmania which has presented this claim. Otherwise I should have contented myself with saying much less. But, in my judgment, all the arguments on behalf of Tasmania are entirely insufficient to justify the conclusion that the section refers to goods imported into Victoria before the imposition of uniform duties.

For these reasons I think that there should be judgment for the defendants.

Barton, J.

In this case counsel have ably put forward all the arguments in favour of the plaintiff State. Although they urge that theirs is the grammatical construction, their arguments have, it seems to me, mainly relied upon the establishment of an ambiguity in the Constitution. The difficulty, if it exists, arises out of the use of the word "imported" in the first line of the first sub-section of sec. 93 without the insertion before it of the words "which are or have been." If those words had been inserted, it is said, there could have been no possible doubt as to the meaning. It is contended that as the words stand it is possible to construe the words "duties chargeable on goods imported" as including duties collected on goods imported before the imposition of uniform duties, and already credited under sec. 89 to the State in which the duties were collected. It may be conceded that if there is fair reason to base this contention on sec. 93 taken singly, there is an ambiguity, provided that section can justly be construed apart from the context. But I cannot see that either condition is fulfilled. Nor, as I shall presently endeavour to show, can the supposed ambiguity be established without wresting from their purpose rules of interpretation which exist for the purpose of solving ambiguities, and not of creating them. But it is further contended that unless this construction be adopted, there will be a manifest absurdity or injustice. This argument is urged in order to control the otherwise certain operation of sec. 89, which itself is admittedly clear. On that topic *Willes*, J., in *Christopherson v. Lotinga*, (1864) 33 L.J.C.P., 121, refers to what is known as Lord *Wensleydale's* golden rule laid down in *Grey v. Pearson*. He says:—"The general rule is stated by Lord Wensleydale in these terms, viz., to adhere to the ordinary meaning of the words used, and to their grammatical construction, unless that is at variance with the intention of the legislature to be collected from the Statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience but no further. I certainly subscribe to every word of the rule except the word absurdity, unless that be considered as used

there in the same sense as repugnance—that is to say, something which would be so absurd with reference to the other words of the Statute as to amount to a repugnance." In my mind closely connected with the reason of that passage, is one I mentioned during the argument. It is in the judgment of *Jervis*, C.J., in *Abley v. Dale*, (1851) 20 L.J., C.P., 235:—"We assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning." Taking these two passages together it seems clear that even if what *Willes*, J., has laid down as to that which constitutes an "absurdity" were not followed in this case, and there is much reason why it should be, nevertheless what is an absurdity in an Act of Parliament is not a mere matter of opinion. It would be an enormity to hold that a Judge who thinks that a certain course, laid down with apparent clearness in an Act of Parliament, is absurd, may use every means to get rid of that literal meaning which, to the minds of responsible legislators, who were in an equal position to judge of its absurdity, appeared to be reasonable.

Jessel, M.R., in *North v. Tamplin*, (1881) 8 Q.B.D., 253, says:—"Any one who contends that a section of an Act of Parliament is not to be read literally must be able to show one of two things—either that there is some other section which cuts down its meaning, or that the section itself, if read literally, is repugnant to the general purview of the Act." Agreeing as I do with the learned *Chief Justice* that the words of sec. 89 are absolutely plain, I cannot adopt the argument addressed to us, that the mere possibility of an alternative construction of another section should diminish or take away from the construction of sec. 89.

Under that section there is no doubt whatever that if the goods were imported into Victoria before the imposition of uniform duties, the Commonwealth would have to credit the duties paid on them to Victoria, and after debiting the expenditure mentioned in sub-sec. (II.), to pay over the balance to Victoria. To take away from the effect of sec. 89 as it appears in the Constitution, "you must have a context even more plain, or at least as plain as the words to be controlled." See *Bentley v. Rotherham*, (1878) 46 L.J. Ch., 284; 4 Ch. D., 588, *per Jessel*, M.R., applying that proposition. Unless the expression relied upon in sec. 93 is, at least, as plain as the expression in sec. 89 so as to show a meaning contrary to that to be collected *primâ facie* from sec. 89, then you cannot begin to use sec. 93 to control the otherwise plain effect of sec. 89. Of course, the words sought to be interpreted might be taken apart from the context afforded by sec. 89, and then it might possibly be urged by some argument that we have not heard, that in support of the plaintiff State's case they have a plain meaning. But I think an expositor who proceeds to construe a Statute by that method would come within the expression used by Lord *Westbury*, L.C., in *Ex parte St. Sepulchre's*, (1864) 33 L.J. Ch., 375, where he says:—"The Vice-Chancellor has taken these words apart from their context. ... He is of opinion that what he denominated the abstract justice of the case requires this interpretation. I cannot concur in that reasoning. I cannot admit the principle that in a matter of positive law abstract justice requires or justifies any departure from the established rules of interpretation." We have in arguments upon the construction of Acts of Parliament frequent appeals made to abstract justice, to the equity of the Statute, or to what is called public policy. As to those matters I wish to refer to some expressions in the judgment of Lord *Tenterden*, C.J., in *Brandling v. Barrington*, (1827) 6 B. & C., 467. He says—"Speaking for myself alone, I cannot forbear observing that I think there is always danger in giving effect to what is called the equity of the Statute, and that it is much safer and better to rely on, and abide by, the plain words, although the legislature might possibly have provided for other cases had their attention been directed to them." It seems to me plain enough that we cannot construe Acts of Parliament by what might possibly have entered into the minds of their framers had their attention been called to the construction afterwards sought to be placed on their language, although I am of opinion that as to the

Constitution the minds of its framers were sufficiently directed to the whole subject to enable them to come to a conclusion that they deemed fair to the various States. Of course it must be carefully remembered that judicial expressions of this kind give no denial to the repeated proofs that a Court of Justice will consider the spirit and intention of an Act apart from its mere words. They apply irresistibly, however, where a close examination of the Act itself does not disclose the supposed dominant spirit or meaning suggested in argument. Such spirit or meaning should be gathered from the instrument itself, and I fail to find the intention suggested by counsel for the plaintiff State after careful consideration of the language of the Constitution, however gladly I agree that the intention of a constitution is rather to outline principles than to engrave details. If counsel for the plaintiff had been able to collect from this Constitution a policy of the Convention elected by the people, or of the Imperial Legislature who gave the instrument the form of law, or of the people who before that had affirmed it by their votes—whichever way it is put—expressions which would indicate in themselves, or by just inference, the policy for which they contend, then there might have been gathered from the instrument something so plain and cogent as to shake, and, perhaps, control the otherwise plain meaning of the words themselves. But although I have no doubt that counsel have made diligent search for the purpose of finding an indication of such a policy, their arguments have, if I may say so with respect, given us no shred of reason to show that intention. As to the consideration of policy, *Coleridge*, C.J., in *Coxhead v. Muller*, (1878) 3 C.P.D., 442, makes some noticeable remarks. He says:—"In the absence of any judicial authority throwing light on the subject, the tendency of my own mind, right or wrong, is to suppose that Parliament meant what Parliament has clearly said, and not to limit plain words in an Act of Parliament by considerations of policy, if it be policy, as to which minds may differ, and as to which decisions may vary. We may thus make that which is a plain and simple enactment, I will not say inoperative, but doubtful or obscure, if considerations are to be introduced into the construction of it when it is entirely uncertain whether they were present to the minds of the legislature when the enactment was made." Without dilating upon those expressions, it seems to me they are exactly applicable to the condition of things attempted to be set up now on behalf of the plaintiff State.

As to the question of public policy, apart from any policy disclosed by the Constitution itself, I find in *Hardcastle's Interpretation of Statutes*, (3rd ed.) at p. 187, a passage which appears to be supported by the authorities. "If public policy is taken as meaning general considerations of State or of opinion, apart from the Statute under discussion, the existence of the rule" (that a Statute may be construed in accordance with public policy) "is open to serious question, and its application is difficult if not mischievous." That passage, so far as it indicates that what is known as public policy, is to be gathered primarily from the Statute itself, and not from the opinions a Judge has been able to form on the subject-matter, seems to me to show the position we should be in if we sought to construe these sections according to the views of good and just policy which are offered for our consideration. The Court would drift quickly into danger in construing Acts according to what each member took to be sound public policy, obviously a function for legislators and not for judges.

Now taking these matters into consideration, and recollecting that the intention of an instrument is to be gathered from the obvious facts of history—if we at all go outside the four corners of the instrument itself and the policy logically to be deduced from its express words—let us go on to consider what was the history of the Constitution.

Certain States, then called Colonies, perfectly independent in relation to each other, three of them on the continent of Australia, and another adjacent to it on the south, agreed to be represented according to the votes of the people by a Convention for the purpose of drawing up a constitution, afterwards to be submitted to popular vote. A fifth State sent representatives elected by its

legislators. The Convention met first in 1897 at Adelaide, where it brought up a draft bill afterwards submitted to the legislatures for their suggestions, under Statutory provisions. The Convention again met and further considered the bill, in Sydney in 1897, and in Melbourne in 1898. In March of the last-mentioned year it brought up what is called the Draft Bill of 1898. Pausing for a moment, I must say in passing that we have been urged to modify what would seem to be the plain meaning of the words of three sections of the Constitution by the fact that in 1891 there were financial provisions, considered by the plaintiff's counsel to favor their contention, inserted in a draft bill by a Convention. That was a body delegated by the several Parliaments, and was not, like the Convention of 1897-8, chosen under Statutes which severally prescribed that the result of its labours, the Draft Constitution, should be submitted to the direct vote of the people. Again, there were substituted expressions in the draft brought up at Adelaide which, it is contended, justify the contention of the plaintiff State. Both these provisions lost their places during the final consideration of the draft bill to be submitted to the people, which was so submitted in New South Wales, Victoria, South Australia and Tasmania, in 1898, and which, so far as the financial arrangements are concerned, is identical in terms with the Constitution itself. It seems to me that the argument that an expression put by an earlier Convention into a draft Constitution is to influence us towards the construction of this Constitution which is afterwards in operation, acts as a two-edged sword, because the abandonment of the earlier provision shows if anything that the Convention had relinquished the idea of submitting it to the people, whose approval was by law essential. The successive alterations of the drafts seem rather to point to the view, not that the final provisions are to be interpreted in the same sense as those struck out of the draft, but that the first intentions were given up, and that entirely different intentions, to be gathered from the language of the Constitution, are those by which we are to abide. Proceeding with my narration of the history of the matter, I said that when the Convention finished its work there was a draft, called the draft of 1898, submitted to the people under the provisions of Statutes of the several States. At this stage only four States were concerned, Queensland and Western Australia taking no part. In the referendum which was taken each of the four States had a majority in favor of the bill, but in the case of New South Wales the number of votes, although a majority, did not reach the limit fixed by a certain Statute, and so in the result the whole of the referendum proved abortive. Afterwards, a conference of the Premiers of the States met, alterations were made in the draft, not even in a remote degree affecting the provisions we are now discussing, and that bill was finally adopted, at the second referendum in 1899, by the four States which, in the previous year, had given majorities in its favor. The State of Queensland in 1899, and the State of Western Australia in 1900, then adopted by referendum the same Bill. The only amendment of substance made by the Imperial Parliament was in the 74th section, and with that amendment the Bill adopted by the people in 1899 and 1900 is now the Constitution.

Now let us see what during that period were the considerations which must have been present to the minds of the framers of the Constitution

. First, there were six existing tariffs which conflicted with each other in a marked degree, and formed barriers between the States both on land and by sea. It was clear that no constitution could successfully carry out a federation of the States unless the tariff were made one for the whole of Australia. It was also obviously impossible to form one external tariff, and yet leave conflicting customs duties which could be levied, on the borders of the States and at their ports, against their sister States. It was, therefore, a necessary corollary to one tariff for the whole of Australia that there should be inter-State freetrade. But the Convention could see that some time must elapse before such a tariff could become law. They therefore prescribed a period of two years within which a uniform tariff should be enacted (sec. 88). They then said to themselves—"What is to be done in the meantime until this uniform tariff is passed? Until then the border duties must still prevail. The

only new fact of finance from now till then will be that the Government of the Commonwealth as a new entity must be provided for, and the funds for the performance of its duties must come out of the general revenues. Each State while it retains its tariff must obviously have credited to it by the Commonwealth the duties collected in that State, and must have debited to it the expenditure in respect of the transferred departments of that State. The one new fact of finance must be allowed for, that is, that there is to be a new expenditure by the Commonwealth in the general administration of the government. That must be charged to each State according to its population, because the new expenditure is for the benefit of all equally." That accounts for the provision in sec. 89, which is only another way of stating these facts. And so we find that in sec. 89 it is provided that until the imposition of uniform duties each State is to be credited with the revenue collected therein by the Commonwealth, and is, whatever its population, to be debited with the expenditure within its bounds by the Commonwealth in the maintenance and continuance of the departments transferred to the Commonwealth (leaving in other respects the ordinary expenditure of the State untouched), and according to the number of its population with the new expenditure of the Commonwealth. Then each State is to be paid periodically the balance owing to it by the Commonwealth. Thus the State of Victoria was entitled to have credited to it these duties, and was entitled to be actually paid month by month its balance, which then would become its absolute property. And as long as sec. 89 was in operation each State was entitled to be credited with all the customs duties lawfully collected within it under its own tariff, a state of things only to end with the extinction of its tariff under sec. 90, paragraph 2. But it must have been present to the minds of the framers of the Constitution that that arrangement would not be appropriate to the new state of things under a uniform tariff. Consequently it was necessary to provide that "on the imposition of uniform duties of customs, trade, commerce and intercourse among the States," should be "absolutely free." Had they not done so, they would not have avoided certain difficulties which have arisen in the United States of America. But there was one case which would have imposed a serious difficulty if they had rested at the first part of sec. 92. Of course the tariffs of the various States differed in comprehensiveness as well as in the degree of taxation. But there was one State which would have reaped an entirely inequitable advantage if sec. 92 had rested at the first paragraph, because that was the State of lowest tariff. The process would have been that before the imposition of uniform duties, the bulk of the imports for all Australia would have gone into that State, where they would have had to pay far fewer and far lower duties than in any of the other States. Then as soon as these uniform duties were imposed, there would have been a free passage of these goods over the whole of Australia. Such a result would have destroyed all the rights of the other States to an equitable share in the customs revenue after federation until the whole of the goods so imported and distributed had gone into consumption. To avoid this the second part of sec. 92 was inserted, which provided that "notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any colony, which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation." The phraseology is pointed at the duties under a State tariff being less than those under the uniform tariff. There could be no federal tariff which would not largely raise the duties in some States and reduce them in others, and we know that result has followed from the imposition of the tariff of the Commonwealth. That is the origin of sec. 92, and I speak of facts well known and purposes clear to all of us.

But the second part of sec. 92 indirectly confirms sec. 89. It speaks of goods imported into a State before the imposition of the uniform tariff, and also of the "duty paid in respect of the goods on

their importation." That could only be the duty payable or paid under sec. 89, and the application of the remainder of this part of sec. 92 rests upon the period following the imposition of uniform duties, which in this case is to be taken as 8th October, 1901. The excess then was the amount to be collected on the goods passing into another State. That it is said has been paid to Tasmania, and in my judgment that is the only payment Tasmania has been entitled to receive.

Speaking still of this current of events, it was necessary for the Convention to provide—I am speaking now of the provisions endorsed by the Parliament of Great Britain and Ireland—for the period of five years following on the imposition of uniform duties. This is to my mind the true transition period, and not that referred to by Mr. Glynn, viz., the period between the establishment of the Commonwealth and the imposition of uniform duties. When the uniform duties were imposed the border duties had collapsed, and the new state of things had to be provided for. Instead of providing for that period as though it were a normal one, when the system would be to collect all the customs and excise duties as one fund, charging all expenditure to the States according to their population, and distributing the balance to the States according to their population, another intermediate period was inserted, because as between State and State the rate of consumption and the purchasing power had of necessity varied widely under their different tariffs, and it would take years for the populations of the several States even to approach an equality of conditions in these respects so as to justify that equal return per head. Hence we find sec. 93, which substituted a system based on the consumption of goods in each State, and under it, where customs duties were charged on the importation of goods into a State, and those goods afterwards passed into another State, the duties were by a statutory fiction taken to have been collected in the latter State, and not in the original State of importation. It was recognized that certain States would become distributing States for a large quantity of the imported goods, and that from these States those goods would afterwards be sent to other States instead of being imported by them directly from external countries, and in order to carry out a fair adjustment the revenue results were regulated according to the place of consumption. That change was not necessary while each State had its own tariff. The reason for it arises on the instant that inter-State freetrade sprang into being. That was the only alteration made, and except so far as the first sub-section of sec. 93 makes an exception to sec. 89, the second sub-section of sec. 93 shows clearly that sec. 89 must be followed in all respects. Those are the systems which, in the two periods I have described, the Constitution deems to be fair. Then in sec. 94 it lays down that "after five years from the imposition of uniform duties of customs, the Parliament may provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue of the Commonwealth," which seems a pretty broad hint on the part of the framers of the Constitution that the provisions thereinbefore specified were what they deemed fair.

I do not think there is much room here for a construction according to what is called the equity of the Statute, not only because I do not gather any reason in support of the supposed equity, but also because this system, which the language of the Statute creates, may very well be considered to be an equitable one, in the sense that its authors framed it as a fair one, for the two intervening periods.

Now, it seems to me that these facts of history throw some light upon the question whether the primary meaning of sec. 93 is to be modified. Sec. 89 provides for the period before the imposition of uniform duties. Sec. 92 is for the prevention of one State becoming the collecting ground for goods under a low pre-federal tariff, with the object of afterwards taking advantage in the other States of the uniform tariff to the great impairment of their customs revenues. Then comes the change. Up to the very day that separate tariffs cease, each customs autonomy is to have its duties collected for it under its autonomous tariff. Not until hostile tariffs are swept away, not until inter-

State freetrade brings the importations more and more to a few distributing centres, not until the need has thus arisen, is the statutory fiction to operate whereby the right to the duties is to depend on the State of consumption. Sec. 93 is a provision for the first five years after the uniform tariff, a period *in futuro*, and as His Honor the *Chief Justice* has said, *primâ facie* the section is to have a prospective operation given to it. It requires, as we all know, extremely strong words to deprive words used in legislation of the prospective meaning they naturally have, and to constitute a section retrospective in meaning. I fail to find in the arguments for the plaintiff State a single reason which would justify us in doing violence to the plain intention as to the period and the subject-matter on which the section is to operate. The word "imported" certainly is a word in the past tense, if you take it by itself, and certainly the construction which is sought to be given to it is a possible construction. Still all the words must be construed with reference to the whole enactment, and to the facts surrounding the framing of the Constitution.

Whichever of these tests is applied, the considerations I have stated appear to me strong to show that the word "imported" is to have a prospective meaning. If the result of both these tests is not convincing, I further think that the words "During the first five years after the imposition of uniform duties of customs, and thereafter until the Parliament otherwise provides"—placed at the head of this section—govern the rest of the section. Weight must be placed on the fact that they are there, whether they were so placed as a matter of skill in drafting or otherwise. But the draftsmen could not have placed them in the forefront, nor could the Convention, nor any other authorities who dealt with them have left them there, without noticing the effect upon the subsequent part of the section of so placing them. And when words of such precisely limiting effect are used in such a place, it is plain not only that the succeeding words take their colour from them, but that the knowledge that they are there will justify the draftsman in using concise expression in the subsequent parts of the section. That is, apparently, what happened here. Whether that is so or not, I cannot see my way to refuse the ordinary weight and power of governing words to these introductory words of sec. 93. It is, therefore, clear to my mind that the whole of the words "chargeable on goods imported into a State, and afterwards passing into another State for consumption," have relation only to the period succeeding the imposition of uniform duties.

There are some judicial expressions which throw light upon the construction of secs. 89, 92, and 93, taken together, and which seem to be in accord with the view which I am taking of this case. First, I find that sec. 89 is absolutely clear. Next I find that sec. 92 is absolutely clear. Conceding the argument that sec. 92 does not deal with apportionment, nevertheless it seems quite plain that the excess of duty in sec. 92 must be dealt with under the apportionment in sec. 99. Taking those sections together and admitting for the sake of argument that sec. 93 is less clear than secs. 89 and 92, I find these words in the judgment of *Tyndall*, C.J., delivering the unanimous opinion of the Judges in the House of Lords in *Warburton v. Loveland*, (1831) 2 Dow. & Cl., 480, at p. 500:—"No rule of construction can require that when the words of a Statute convey a clear meaning ... it shall be necessary to introduce another part of the Statute, which speaks with less perspicuity, and of which the words may be capable of such construction as by possibility to diminish the efficacy of the other provisions of the Act." Applying those expressions to these sections I should say they amount to this: Seeing that sec. 89 has an absolutely clear meaning, the rules of construction do not require us to introduce another part of the Statute which speaks with less perspicuity, and to apply that part to the construction of sec. 89. That would have the effect of diminishing the clearness of sec. 89, and appears to me to be an absolute inversion of the rule which is applicable in such a case. *Hardcastle*, in his work on the *Interpretation of Statutes*, (3rd ed.) p. 111, says:—"It is only when, as the Court said in Palmer's Case, (1784) 1 Leach., 355, any part of an Act of Parliament is penned obscurely, and other passages can elucidate that obscurity, recourse ought to be had to such context

for that purpose."

This cannot apply to the raising, by means of such obscurities, of constructions from which the plain language itself is free. It is not by raising obscurities in sec. 93 that we can diminish the plain meaning of the words of sec. 89. On the other hand, if sec. 93 can be read as in any way obscure, then it is clear that under the opinion expressed in *Palmer's Case (supra)*, recourse can be had to sec. 89 to clear up that obscurity. In my opinion there is no obscurity whatever in sec. 93. I very much doubt the existence of any obscurity even if that section were wholly divorced from the sections with which it ought to be read, particularly sec. 89.

I have nothing to add except that I can understand the hardship which Tasmania thinks she has suffered, and I can sympathise with her. There is no Act of Parliament for the displacement of old conditions and the substitution of new ones, which can be so applied as to prevent hardship. The Constitution does not differ from other Statutes in that respect. It cannot go further than to lay down broad principles. Hardship must arise, and if the Constitution had attempted to deal with details, the result would possibly have been to create more hardships. We have no right, however, in this Court to submit our judgment to be influenced by any such consideration. We have to declare what seems to us to be the proper meaning of the language, and we are to arrive at that meaning by reference to the words themselves and to the history of the law. The result seems to me to be the same in whatever way we approach the matter. I have not dealt with the question of the excise duties because it does not seem to be seriously contended that the claim to them can be sustained despite the failure of the claim to the customs duties. But I ought to say that if there is but little support for the claim under question 1, there is, in my opinion, none at all for that under question 2.

O'Connor, J.

I concur in the judgments which have just been delivered. I do not think it can be too strongly stated that our duty in interpreting a Statute is to declare and administer the law according to the intention expressed in the Statute itself. In this respect the Constitution differs in no way from any Statute of the Commonwealth or of a State. In his very able argument for Tasmania, Mr. Glynn seemed to me rather to reverse the position in which considerations in the interpretation of a Statute are to be applied. He laid down some general principles of what he described as ethics—international or inter-State ethics—and he asked us to say that the interpretation of the Constitution must be based on those principles. It appears to me the only safe rule is to look at the Statute itself, and to gather from it what is its intention. If we depart from that rule we are apt to run the risk of the danger described by *Pollock*, C.B., in *Miller v. Salomons*, [1852] EngR 461; (1852) 7 Ex., 475, at p. 560. "If," he says, "the meaning of the language be plain and clear, we have nothing to do but to obey it—to administer it as we find it; and, I think, to take a different course is to abandon the office of Judge, and to assume the province of legislation." Some passages were cited by Mr. Glynn from *Black on the Interpretation of Laws*, which seem to imply that there might be a difference in the rules of interpretation to be applied to the Constitution and those to be applied to any other Act of Parliament, but there is no foundation for any such distinction. The intention of the enactment is to be gathered from its words. If the words are plain, effect must be given to them; if they are doubtful, the intention of the legislature is to be gathered from the other provisions of the Statute aided by a consideration of surrounding circumstances. In all cases in order to discover the intention you may have recourse to contemporaneous circumstances—to the history of the law, and you may gather from the instrument itself the object of the legislature in passing it. In considering the history of the law, you may look into previous legislation, you must have regard to the historical facts surrounding the bringing the law into existence. In the case of a Federal Constitution the field of inquiry is

naturally more extended than in the case of a State Statute, but the principles to be applied are the same. You may deduce the intention of the legislature from a consideration of the instrument itself in the light of these facts and circumstances, but you cannot go beyond it. If that limitation is to be applied in the interpretation of an ordinary Act of Parliament, it should at least be as stringently applied in the interpretation of an instrument of this kind, which not only is a statutory enactment, but also embodies the compact by which the people of the several colonies of Australia agreed to enter into an indissoluble union.

When we look at the words of the Constitution it is apparent that one of the objects aimed at was to bring about the freedom of inter-State trade as soon as possible, but it is also clear that that could not be done until a uniform tariff was established. The establishment of a uniform tariff could only be effected after a discussion which the Constitution contemplated would last some time, because the period of two years is fixed as that within which provision must be made for the uniform tariff. During that period provision must be made for carrying on trade between the States and for collecting the revenue of the Commonwealth. It is apparent that there is, therefore, a clear line drawn between the period before the imposition of uniform duties and the period after it. Until the imposition of uniform duties nothing could be done in the way of bringing about inter-State freetrade. Therefore provision had to be made for a method of keeping the accounts both before and after that object had been secured. Now the system adopted is as plainly as words can make it that set forth in secs. 89 and 93. I do not propose to enter into any detailed examination of those sections, because they have been so fully dealt with by the other members of the bench. It is only necessary for me to say that sec. 89 contemplates a condition of things in which the States remained, so far as customs duties are concerned, in exactly the same position as before the union, with the exception that the Commonwealth collected the duties instead of the States. The State laws remained in force under sec. 108, and the States had power to amend customs laws, and to get the advantage of their own customs laws. But on the imposition of uniform duties under sec. 90, all those laws of the several States came to an end. Up to that time they had the full liberty of obtaining all the advantages of collecting duties in the State of consumption.

When you come to the period after that, you then for the first time, can apply the principle of inter-State freetrade, and then for the first time you find the declaration that when goods have been imported into one State and afterwards pass into another State for consumption, the State of consumption shall be taken to be the State of collection. Mr. Glynn contends that on the face of the Constitution, it was intended that that principle should apply both before and after the imposition of uniform duties. I can see no evidence whatever of such an intention. On the contrary, provision is made under which each State is allowed before the imposition of uniform duties to get the benefit which it had under its own tariff. After the imposition of uniform duties, when for the first time freedom of inter-State trade could be introduced, then for the first time this other principle that the State of consumption is to be the State of collection can be applied.

In considering sec. 93, having regard to the intention of the Constitution which I have indicated, we must first of all look at the structure of the whole section. In the framing of the section the limitation of five years seems to have been placed at the head of the section deliberately so as to govern the whole section. To begin with, the words are "During the first five years after the imposition of uniform duties of customs, and thereafter until the Parliament otherwise provides." Then follow the provisions in sub-secs. (I.) and (II.) The plain, ordinary, grammatical construction of a section of that kind is that the legislature has by placing that limitation before the whole of the section, intended it to apply to the whole of the section. When we look at sub-sec. (I.) it is plain that that ordinary natural interpretation must be followed, because it begins—"The duties of customs

chargeable." What duties of customs were in existence during the first five years after the imposition of uniform duties? Surely the uniform duties, and the uniform duties only, and if that be so when the legislature was speaking of "the duties of customs chargeable," the only duties of customs which could be referred to were the uniform duties of customs. If they were speaking of the uniform duties of customs, then the word "imported" must apply to the importation of goods on which uniform duties have been paid, that is to say importation after the beginning of the period of five years.

It is not necessary for me to repeat what has already been said by the other members of the Bench in regard to the other indications of the intention of the legislature furnished by this section itself. I think it only necessary to say this in addition. If you interpret this sec. 93 as being governed in every part of it by the time limitation of five years after the imposition of uniform duties, you give a natural meaning to every word of it; you avoid the absurdity of an interpretation which would by a fiction hand over to a State duties which could not possibly have been collected in it during the period before the imposition of uniform duties; and you carry out, it appears to me, the intention of the legislature, which was to draw a hard and fast line between the two periods.

Sec. 92 throws a strong light upon the contention put forward by Mr. Glynn. The very class of importations with which we are now concerned in this case, has been dealt with by that section. It has been dealt with in a limited way only. The period during which it applies is the two years after the imposition of uniform duties. During that period the State of consumption gets the excess of the Commonwealth duty above the State duty, not the whole of the duty. In these circumstances when the legislature has in sec. 92 expressly provided, and in that limited way, for this very class of importation, for the two years after the imposition of uniform duties, is it likely that it would provide merely by an implication from doubtful words, for a much more important matter, viz., the apportionment of these duties amongst the several States through the whole period of five years. I am of opinion that, so far from such an intention being disclosed by the Constitution itself, the plain intention is to apply the law in force before the imposition of uniform duties, to the duties collected before that time. I think the Constitution has declared as strongly as possible upon its face, that the provision that the State of consumption is to be taken to have been the State of collection, is to apply only after the imposition of uniform duties, and to goods imported after the imposition of uniform duties. The one exception made to that provision, is in sec. 92, and it is made to avoid the possibility of one State with low duties loading up large quantities of goods, before the imposition of uniform duties, and afterwards becoming in respect of those goods the distributing centre for the rest of the States.

Under these circumstances, it appears to me the plain words of the section are against the view put forward on behalf of Tasmania. The whole intention of the Constitution as gathered from the Constitution itself, is in the same direction. I agree with the other members of the Bench that the money in question properly belongs to Victoria, and should remain with her.

Griffith, C.J.—Both questions will be answered in the negative.

Collins did not ask for costs.

Questions answered in the negative. Plaintiff to pay the costs of the Commonwealth.

Solicitor for plaintiff, Hobkirk, Crown Solicitor for Tasmania.

Solicitors for defendants, C. Powers, Crown Solicitor for Commonwealth; Guinness, Crown

Solicitor for Victoria.

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