HIGH COURT OF AUSTRALIA

The King

Vs.

Edwin Frederick Sutton

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

22nd May 1908

Griffith C.J.

This is an action for penalties for a breach of sec. 33 of the *Customs Act 1901*, which provides that no goods subject to the control of the Customs shall be moved, altered, or interfered with except by authority and in accordance with the Act. The defendant, by authority of the Executive Government of New South Wales, took from the control of the Customs a quantity of wire netting recently landed from an oversea ship upon which Customs duties were claimed by the Commonwealth authorities. The Government of New South Wales claimed that the goods were not liable to duty, and that they were entitled to take possession of them as soon as they were landed. Three questions are formally submitted for the opinion of the Court:—

(*a*)

Do the provisions of the *Customs Act 1901* bind the Crown as representing the community of New South Wales?

(*b*)

Were the said 1,313 rolls of wire netting at the time of their removal by the defendant subject to the control of the Customs?

(*c*)

Was the defendant lawfully entitled to remove the said 1,313 rolls?

The rule that the Crown is not bound by a Statute unless expressly mentioned, or unless it appears by necessary implication that it was intended to bind the Crown, is a rule of construction, the object of which, as of other rules of construction, is to give effect to the intention of the legislature. If it appears clearly that the intention was that the Crown should be bound, effect is given to this rule by so holding. The rule was expounded by this Court in the case of *Roberts v. Ahern*[1]. In that case, I said, in delivering the judgment of the Court:—"It is a general rule that the Crown is not bound by a Statute unless it appears on the face of the Statute that it was intended that the Crown should be bound by it. The rule has commonly been based on the Royal prerogative. Perhaps, however, having regard to modern developments of constitutional law, a more satisfactory basis is to be found in the words of Alderson B., delivering the judgment of the Court of Exchequer in Attorney-General v.

Donaldson210 M. & W., 117, at p. 124.: It is a well established rule, generally speakiing, in the construction of Acts of Parliament that the King is not included unless there be words to that effect; for it is inferred primâ facie that the law made by the Crown with the assent of the Lords and Commons is made for subjects and not for the Crown. The modern sense of the rule, at any rate, is that the Executive Government of the State is not bound by Statute unless that intention was apparent. The doctrine is well settled in this sense in the United States of America. In the language of Story J.: Where the Government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischief to be redressed, or the language used, that the Government itself was in contemplation of the legislature, before a court of law would be authorized to put such a construction upon any Statute. In general, Acts of the legislature are meant to regulate and direct the acts and rights of citizens, and in most cases the meaning applicable to them applies with very different and often contrary force to the Government itself. It appears to me, therefore, to be a safe rule founded on the principle of the common law that the general words of a Statute ought not to include the Government unless that construction be clear and indisputable upon the text of the Act: United States v. Hoar12 Mason (U.S. Circuit Court), 311.."

This being the meaning of the rule, it follows that it does not apply to every person who in any part of the world represents the Crown, but only to those representatives of the Sovereign who have executive authority in the place where the law applies, and, even there, only as to matters to which that executive authority extends. The limits of the authority of a Governor were pointed out by the Judicial Committee in the case of *Musgrave v. Pulido*[4]. "It is apparent from these authorities that the Governor of a Colony (in ordinary cases) cannot be regarded as a Viceroy; nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission, and limited to the powers thereby expressly or impliedly entrusted to him. Let it be granted that, for acts of power done by a Governor under and within the limits of his commission, he is protected, because in doing them he is the servant of the Crown, and is exercising its sovereign authority; the like protection cannot be extended to acts which are wholly beyond the authority confided to him. Such acts, though the Governor may assume to do them as Governor, cannot be considered as done on behalf of the Crown, nor to be in any proper sense acts of state. When questions of this kind arise it must necessarily be within the province of Municipal Courts to determine the true character of the acts done by a Governor, though it may be that, when it is established that the particular act in question is really an act of state policy done under the authority of the Crown, the defence is complete, and the Courts can take no further cognizance of it."

The limits of the authority of the Executive Government of an Australian State are not merely geographical. Under the Constitution there are many matters with respect to which the Commonwealth Government has exclusive authority, and the State Governments have no concern whatever. The Crown, as the head of the Commonwealth Government, is for many, if not all, purposes a separate juristic person from the Crown as head of a State Government, as was pointed out in *The Municipal Council of Sydney v. The Commonwealth*[5].

In matters under the exclusive control of the Commonwealth Government the doctrine applies to the Sovereign as head of that Government, but has no application to the Sovereign as head of the State Governments.

What concern then has the State Government with the administration of Customs laws? In my judgment, none. By sec. 86 of the *Constitution* the collection and control of duties of Customs passed to the Executive Government of the Commonwealth from its establishment, and by sec. 52 the power of the Parliament with respect to all matters relating to that Department of the Public

Service became exclusive. It follows that for the purposes of Customs administration the State Governments are in no better position than private persons. For these purposes there is one territory only, and all goods imported into that territory are subject to the law of the Commonwealth.

It is suggested that, although this may be so, yet if the goods were in fact not dutiable the State Authorities were justified in taking them out of the control of the Customs. In the case of a private individual who imports non-dutiable goods, this argument will not bear statement. The Customs Authorities are not bound to accept the assertions of the importer as to the character of the goods imported, of which the importation may be altogether prohibited. The nature of the case renders it necessary—as has always been done in practice—that imported goods should be retained under the control of the Customs for a sufficient time to discover (1) whether they may be lawfully imported, and (2) whether they are dutiable, and if so at what rate. In my opinion, this law applies to goods the property of a State Government as well as to those of private persons, and it is quite immaterial whether the goods are in law dutiable or not.

The result of the contrary view would be extraordinary. Notwithstanding the paramount control as to external trade given in express words to the Commonwealth, the States would retain concurrent power to introduce goods the introduction of which is prohibited by the Commonwealth law. Moreover, Customs laws have always been regarded as a mode of exercising this power of control. If, however, the States have a concurrent power, that of the Commonwealth would be neither exclusive nor paramount.

If the suggested right of the Crown as representing the State Government exists at all, it must be capable of being exercised in any other part of the Commonwealth, a view which is, of course, inconsistent with the geographical limits of the authority of the State Executive.

For these reasons I am of opinion that the *Customs Act 1901* applies to goods imported by the Government of a State.

It was not disputed that, apart from any question depending upon their being the property of the State, the goods in question were at the time of their removal subject to the control of the Customs.

It follows that the defendant was not lawfully entitled to remove the goods in question, and that there is no defence to this action.

Barton J.

The questions for our opinion are:—

(*a*)

Do the provisions of the *Customs Act 1901* bind the Crown, as representing the community of New South Wales?

(*b*)

Were the 1,313 rolls of wire netting at the time of their removal by the defendant subject to the control of the Customs?

(*c*)

Was the defendant lawfully entitled to remove the said 1,313 rolls?

The case was argued on the assumption that the goods were not dutiable, although demand had been made for their admission duty-free, and the Collector for New South Wales had refused to comply with that demand, and had required that an entry should be passed and duty paid or deposited (sec. 167) before the delivery of the goods. Let us assume then that the Collector was wrong in insisting on duty; the real question is whether the defendant, acting on the authority of the Executive Government of the State, was justified in removing even non-dutiable goods in respect of which the conditions of Part III. of the Act had not been complied with, or whether by removing them in such circumstances he has not rendered himself liable in this action to pay a penalty under sec. 33. His liability depends upon the answers of the Court to the questions stated in the special case. Unless the defendant is protected by the authority of the Government of New South Wales he has clearly no defence. Sec. 167 of the *Customs Act* provides a means of deciding disputes as to the liability of goods to duty. In this case the means provided were not adopted, but the goods were removed in face of the opposition or objection of the Customs Authorities, and if the protection claimed is not valid in law, the penalty has been incurred.

The question whether the goods were instrumental in carrying on the Government of the State was faintly suggested at the bar, but has not been seriously raised in this case. There is nothing in the case stated on which such a defence could be rested. The question will, however, demand close consideration in connection with the case of *The Attorney-General of New South Wales v. The Collector of Customs*[6], on which judgment stands reserved.

It is necessary now to inquire on what grounds the defendant relies on his authority from the Government of this State as a defence. They are two—I think in effect only one—namely, that the goods were the King's property, and that the *Customs Act* does not bind the Crown. The terms "the King" and "the Crown," are of course used respectively to denote the Executive Head of the State. The first proposition was based, broadly, on the rule of construction stated by *Alderson* B. in *Attorney-General v. Donaldson*[7]. But I take the two propositions—that these goods were not subject to Customs control because they were the King's property, and that the *Customs Act* does not bind the Crown—as invocations of one and the same principle with a difference of form. To say, as *Alderson* B. said, that "it is inferred primâ facie that the law made by the Crown, with the assent of Lords and Commons, is made for subjects and not for the Crown," is only to say in other words, with *Story* J. in *United States v. Hoar*[8], that it appears to be "a safe rule founded on the principles of the common law that the general words of a Statute ought not to include the Government unless that construction be clear and indisputable upon the text of the Act." But, indeed, whether the matter is considered from the side of prerogative or from that of statutory construction matters little, since, if the words or the clear inference from words show that the Government of the legislating authority was intended to be included, the result is in either case the same, and the intention of the legislature will prevail. Let us turn then to the Act in question and examine a few of its provisions on this subject of Customs control. Sec. 30 provides that "Goods shall be subject to the control of the Customs ... (a) As to all goods imported—from the time of importation until delivery for home comsumption," &c. By sec. 31, "All goods on board any ship or boat from parts beyond the seas shall also be subject to the control of the Customs whilst the ship or boat is within the limits of any port in Australia." ("Australia" includes the whole of the Commonwealth, see *Acts Interpretation Act 1901*, sec. 17). "The control of the Customs especially includes the right of the Customs to examine all goods subject to such control" (sec. 32). Is it possible to overrate the degree of

confusion and inconvenience that would result to the administration of the Customs over this Continent and Tasmania, if provisions such as these were not of general application? Is it possible to suppose that the intention of Parliament was to license the wholesale importation of goods by States the sum of whose operations extends to every port and throughout this vast area; an importation unchecked not merely in extent, not merely in respect of duties, but even in respect of the most casual inspection? But what doubt remains when we look at sec. 33? "No goods subject to the control of the Customs shall be moved altered or interfered with except by authority and in accordance with this Act." Remembering that the absence of all check in respect of duty or otherwise would enable any State (for such is the real extent of the authority claimed) to be its own judge of what and how much it will import, and to set to such importation no bounds but those which the extent of its projects, or its relations with the Australian Government, might dictate; if every movement or treatment of every part of the enormous bulk to which such importations would soon grow is to be free of all regulation or control by the fiscal authority of any port, can one well conceive the state of affairs which would speedily arise if such uncontrolled importations and movements were licensed to proceed side by side with the work of ordered administration on the part of the Customs Department? It is not possible that Parliament has given its sanction to a state of the law which, once it reached its full operation, could only be productive of chaotic conditions and ruined revenue. In my opinion the Statute excludes the supposition.

But happily there is no danger of such results, for the federal power is strong to avoid them. In the first place the doctrines invoked by the defendant do not sustain the assumed authority on which he relies. They are correctly stated, but they fail completely in their application. It is *its own* Executive Government, in this case that of the Commonwealth, that the Parliament is deemed not to include by general words "unless that construction be clear and indisputable upon the text of the Act." A State Executive cannot claim the protection of the doctrine where it is not the King's agent. The Federal Executive is the King's only agent in cases where the federal power is exclusive. When that power wholly occupies the field, as in the case of the control of the Customs, the State Governments are *ex necessitate* out of that field, which knows as occupants one Government and one people, the Australian Government, and the Australian people who give it life. So in the domain of exclusively national legislation there is no room for State Parliaments or Executives. They have great powers, which this Court has guarded, and will guard. But as far as the law of the Constitution is concerned, State Governments are supreme in their sphere and powerless beyond it. And this is also true of the Australian Government in its turn. In a note to the case of *Stockton v. Baltimore and New York Railway &c. Co.*[9], a very instructive case, Dr. *Thayer*, Weld Professor of Law at Harvard University, a high authority, says at p. 2,068 of his *Cases on Constitutional Law*, in relation to the power to regulate commerce with foreign nations, and among the several States, &c.:—"We think that the power of Congress is supreme over the whole subject, unimpeded and unembarrassed by State lines or State laws; that, in this matter, the country is one, and the work to be accomplished is national; and that State interests, State jealousies, and State prejudices do not require to be consulted. In matters of foreign and interstate commerce there are no States." That these words truly express the nature and extent of the commerce power, as interpreted by the Supreme Court of the United States, there can not be a doubt. So long as the legislative exercise of the power is kept within its ambit, that is, so long as the federal grantee does not attempt to regulate the purely internal and domestic commerce of a State, such exercise and its executive consequences cannot be hindered or nullified in any part by any legislative or executive act on the part of a State. A Statute of a State—the highest exercise of power of which it is capable—would be void so far as it purported to authorize such an act; and there is no constitutional authority in the Executive of the State to do that which no Statute of its Parliament could make lawful. It follows that in such a case

no citizen can justify under an authority purporting to be granted him by a State Executive, for that is no authority at all. Now, the case against interference by a State becomes stronger when the subject matter is the control of the Customs. The power of the Federal Parliament to impose duties of Customs did not, it is true, become exclusive until the passage of the first tariff (sec. 90 of the *Constitution*). But the collection and control of Customs duties passed to the Executive Government of the Commonwealth on its establishment (sec. 86). And, subject to the Constitution, the Parliament has from the beginning had exclusive power to make laws with respect to "Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth" (sec. 52 (ii.)). It is this power, indeed, that the Parliament exercised when, in anticipation of the tariff, it passed the *Customs Act 1901* in its first session, and in the Constitution I find nothing that limits the operation of that Statute further than its own terms disclose. But the terms which are employed in secs. 52, 86 and 90 to secure the constitutional powers with respect to the Customs, leave no doubt of their plenary and exclusive character. Hence in the matter of the control of the Customs and the imposition of import duties it may be said that "there is no State" as emphatically, if not more so, than it was said of matters of foreign and interstate commerce. In this matter, if in any, "the country is one, and the work ... is national," so purely national (using the word in the limited sense properly imposed by the Imperial connection), that the Constitution has made it the exclusive concern of the Federal Parliament. *Bradley* J., in the case of *Robbins v. Shelly County Taxing District*[10], said:—"It seems to be forgotten in argument that the people of this country are citizens of the United States, as well as of the individual States, and that they have some rights under the Constitution and laws of the former, independent of the latter, and free from any interference or restraint from them." What *Bradley* J. said of the citizens of the United States is equally true of the people of Australia.

In my view, then, the answer to the first question must be in the affirmative, but with strict remembrance that in exclusively Commonwealth matters there are not seven Executive Governments, but only one, that of the Commonwealth itself. It follows that the second question must be answered in the affirmative, and the third in the negative.

Judgment must therefore be for the plaintiffs, for such penalty as may now be fixed.

O'Connor J.

The *Customs Act 1901* subjects all goods imported into Australia to Customs control from the time of importation until an entry passed in the proper form gives the importer authority to move them, and the passing of such an entry is as necessary in the case of goods duty free as in the case of those liable to duty. It is therefore abundantly clear that, if the goods, which are the subject of this action, and the persons whose conduct is complained of, are subject to the *Customs Act*, there can be no answer to the claim for penalties. The defendant, however, rests his defence upon the legal ground raised by the special case, which is that the Crown, as representing the community of New South Wales, is not bound by the *Customs Act*, and that the goods are its property.

The whole controversy turns upon the proper interpretation to be placed upon the Constitution and upon the *Customs Act*. The words of both Acts are wide enough to cover the facts of the case and must be held to cover them unless for some reason their meaning is to be restricted so as not to apply to the Crown in the sense in which that expression is used in the case. The principle relied on is entirely one of construction.

Before considering in what form it should be stated and in what way it is applicable in the

construction of the two Statutes I have mentioned, it is necessary to advert to the position of the King as executive head of each of the States and of the Commonwealth respectively. For some purposes the King, as representing the executive power of the Empire, is the same juristic person throughout the whole of his Dominions. The enlistment and control of his army is one of those purposes, as was held in *Williams v. Howarth*[11]. But, except for those purposes, he is not the same juristic person throughout the whole of his Dominions. In the case of the *Municipal Council of Sydney v. The Commonwealth*[12] it became necessary to consider the matter, and the following statement of the Chief Justice, concurred in as it was by Mr. Justice *Barton* and myself, represents the opinion of the Court. "It is manifest from the whole scope of the Constitution that, just as the Commonwealth and State are regarded as distinct and separate sovereign bodies, with sovereign powers limited only by the ambit of their authority under the Constitution, so the Crown, as representing those several bodies, is to be regarded not as one, but as several juristic persons, to use a phrase which well expresses the idea. No better illustration can be given than is afforded by the lands now sought to be rated, which, having originally been property of the State, i.e. lands of the Crown in New South Wales, have become vested in the Commonwealth, i.e. vested in the Crown in right of the Commonwealth."

The King's representative in the Commonwealth and in each of the States cannot, as was pointed out in *Musgrave v. Pulido*[13], be regarded as Viceroy, or as possessing sovereign power. His powers are limited by his instructions and are also necessarily limited by the Constitution of the State or the Commonwealth as the case may be. In anything outside the exercise of the powers so limited he is in law no more than an individual subject of the King. A Federal Constitution in its very nature presupposes the separate and independent existence of the King as representing the community in each State and in the Commonwealth respectively, the King in that representative capacity as head of the Executive being in a position in each case to assert and maintain the rights of the political entity he represents.

Now, the rule of construction upon which the defendant relies was fully considered in *Roberts v. Ahern*[14], and I take it that the statement of the principle contained in the judgment in that case is that which must now be adopted by the Court:—

It is a general rule that the Crown is not bound by a Statute unless it appears on the face of the Statute that it was intended that the Crown should be bound by it. This rule has commonly been based on the Royal prerogative. Perhaps, however, having regard to modern developments of constitutional law, a more satisfactory basis is to be found in the words of *Alderson* B., delivering the judgment of the Court of Exchequer in *Attorney-General v. Donaldson*[15]: "it is a well established rule, generally speaking, in the construction of Acts of Parliament that the King is not included unless there be words to that effect; for it is inferred primâ facie that the law made by the Crown with the assent of Lords and Commons is made for subjects and not for the Crown." The modern sense of the rule, at any rate, is that the Executive Government of the State is not bound by Statute unless that intention is apparent. The doctriné is well settled in this sense in the United States of America. In the language of *Story* J.: "Where the Government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischief to be redressed, or the language used, that the Government itself was in contemplation of the legislature, before a Court of law would be authorized to put such a construction upon any Statute. In general, Acts of the legislature are meant to regulate and direct the acts and rights of citizens, and in most cases the meaning applicable to them applies with very different and often contrary force to the Government itself. It appears to me, therefore, to be a safe rule founded on the principles of the common law that

the general words of a Statute ought not to include the Government unless that construction be clear and indisputable upon the text of the Act": *United States v. Hoar*[16].

Such being the principle upon which the rule of construction rests, it is obviously applicable only in the determination of the question whether the King, as representing the community whose legislation is under consideration, is or is not bound by enactment. It cannot be applied to determine whether the enactment binds the King as representing some other community. It is applicable in the inquiry whether a Commonwealth Act binds the King as representing the Commonwealth. But where the inquiry is whether the Commonwealth Act binds the King as representing one of the States it can have no relevancy.

Coming now to the application of the principle of construction to the enactments in question, it would follow that, although that principle may be used to ascertain whether the King, as representing the Commonwealth, is bound by the *Customs Act*, it cannot be used in the inquiry whether the King, as representing the community of New South Wales, is bound by the Constitution or by the *Customs Act*. In such a case the obligation of the Crown as representing the community of New South Wales to obey the Constitution and laws, such as the *Customs Act* passed under its authority, depends upon entirely different considerations.

It is, of course, conceded that the British Parliament in enacting the Constitution could confer on the Commonwealth the power of controlling the State Executives, and therefore the King as representing the community in any State, and it is beyond question that that power has been conferred in cases where the limitation of State powers is necessary for the effective exercise of Commonwealth powers. The main purpose of the Constitution is the distribution between the Commonwealth and the States of all the governmental powers of the people of Australia. The States, in the exercise of the powers exclusively reserved to them, are confined as before Federation within the jurisdiction of their territorial limits. But in the exercise of the exclusive powers of the Commonwealth, State boundaries disappear, and the whole of Australia becomes one territory. The laws of the Commonwealth are, to use the words of sec. V. of the covering clauses of the Constitution, "binding on the Courts, Judges, and people of every State, and of every part of the Commonwealth, notwithstanding anything in the laws of any State." Such laws have operation on all Australian citizens irrespective of their division into State communities, and any Commonwealth law may also expressly bind or except from its operation States or Executive Governments of States. In determining, therefore, whether the King, as representing the community of a State, is bound by a Commonwealth law, the only questions that can arise are whether its language includes the subject matter in question, whether the law is within the powers of the Commonwealth, and whether it has excepted the King as representing the community of the State, State itself, the State Executive, or the goods of the State from its operation.

Coming now to the Commonwealth law under consideration, it may also be an exercise of the power to regulate commerce, but it is primarily an exercise of the exclusive power of the Commonwealth to impose duties of Customs and Excise. Neither the King, as representing the community in each State, nor the State Executives have been excepted from its provisions—on the contrary it is plain that the effective operation of the Act would be impossible if the exemption now claimed were allowed. In my opinion, the goods of the State of New South Wales are under the *Customs Act* in the same position as the goods of any citizen of New South Wales, and the individuals constituting the executive authority of New South Wales are under that Act in the same

position as any other individuals in New South Wales, and equally bound to obey the provisions of the Customs laws.

For these reasons I am of opinion that the legal ground of defence set up by the State of New South Wales must fail, and the questions put in the case must be answered in favour of the plaintiffs.

Isaacs J.

No question of taxation is raised in this case. It was assumed that wire netting was free from Customs duty, and strictly speaking the only point for decision is as to the legality of the forcible seizure of the wire by the defendant. The following case[17], however, fully raises for judicial determination larger questions argued in both, and consequently it will be convenient to consider them at once so far as they are common to both cases. I leave out of consideration in this judgment the force and effect of sec. 114 of the *Constitution*. Apart, then, from that section, the issue is clear cut; whether the States can import into Australia any goods they desire, of whatsoever nature and condition, free from the operation of the Commonwealth laws, and free from any Commonwealth supervision or examination; or, if that proposition be not universally true, then with this limitation only, that the goods must be intended for utilization in some governmental function. When the power of legislation with respect to trade and commerce with foreign countries was granted to the Commonwealth, it was a surrender, not partial, but complete, of the supreme authority to control the introduction into Australia of goods from abroad. How far any specified articles of merchandise might be the subject of that trade and commerce and intermingled with the common stock of property in the Commonwealth was not to be dependent on the single will of any State, nor on the separately declared will of all the States, but was to be determinable by the united action of the whole Commonwealth speaking for all the people, regarded as one community undivided by State lines. The grant of the trade and commerce power was not intended to be illusory; but if the States had the rights contended for of bringing in whatsoever goods they please, even in antagonism to Commonwealth regulation of the subject, the grant would be altogether illusory. By sec. 92, inter-state trade is declared to be absolutely free, and foreign goods once incorporated into the common stock are subject only to State regulation of trade, and consequently any federal regulation of foreign commerce would be nugatory if by means of State agency merchants could evade or overcome it. On the plea that the goods were the King's property, the whole power of the trade and commerce clause could be rendered futile, and in this simple fashion one of the prime essentials of the federal system could be nullified. A construction of the Constitution leading to so absurd and destructive a result is impossible of acceptance.

The argument is rested on the doctrine that the King is not bound by a Statute unless referred to expressly or by necessary implication. So far as this argument is addressed to the Constitution, the instant answer is that the very essence of that instrument is to bind the Crown. True, in a sense, the Crown is one and indivisible throughout the Empire, but its power is not one and indivisible: it acts by different agents with varying authority in different localities or for different purposes in the same locality. The Constitution redistributed the Royal power over the territory of Australia. Formerly, and subject only in the last resort to the will of the Imperial Parliament, the Sovereign exerted his authority over his subjects in each separate Colony solely by his local representatives and advisers there, and with regard to all matters of legislative and executive control. The distribution of power effected by the Constitution has produced this change in the position of the King: that his sovereign power is no longer exercised by means of those representatives and advisers over so large a field of subject matters or, in some cases, with the same finality. His Commonwealth representatives and advisers in all matters committed to them are now either the exclusive or the dominant depositaries

of the Royal authority. Trade and commerce with foreign countries is one of those matters. Customs taxation is another. The States are still His Majesty's agents—so far, for instance, as the general construction and management of railways are concerned, and for the purpose of acquiring the ownership of property destined for use in connection with the railways in their respective territories—but they are not his agents to exercise his sovereign jurisdiction with regard to the introduction of articles of commerce into this continent contrary to the declared will of the Federal Parliament. That would be in plain repugnance to the supremacy of Commonwealth law expressly established by the Constitution. If the Commonwealth Parliament cannot bind the King at all because the Constitution gives it no power to do so, that inability on the part of the Parliament must exist with respect to the Sovereign as the head of every part of his Dominions alike. Under cover of this immunity—and learned counsel avowedly pressed the matter so far—the Governments of Canada, Jamaica, India, or Hong Kong could equally compel the Commonwealth to receive their property in opposition to its own laws because His Majesty is in law the owner, and once the goods come within the territory as part of the common stock, federal regulation of trade does not exist. The contention must logically carry with it the power of every State Government to introduce labour for its public works, from any country, of any description, and in any quantity, and in derogation of whatever prohibition upon the entrance of undesirable immigrants the Federal Parliament might think fit to adopt, for the argument if valid cannot stop at any class of Statute. A State might at any moment deem it advantageous to adopt an internal policy that would involve utter conflict between its ideas of public welfare and those declared by the Commonwealth Parliament, and if this argument for the defendant were to prevail, the way would be open for the State to disregard every federal law upon the subject of foreign trade and commerce, immigration, and almost every other subject enumerated in the Constitution, and so make that document practically worthless as an instrument of government, and reduce federation to a shadow.

The modified contention alternatively presented is said to be involved in previous decisions of this Court that Commonwealth law is incapable of impeding State instrumentalities, or, in other words, the means employed by the State to carry out its governmental functions. In this argument a distinction is made between sovereignty and trading, and reference was made to *South Carolina v. United States*[18]. A possible distinction between the King as a Sovereign and as a trader was adverted to by Lord *Stowell* in the case of *The Swift*[19]. But no decision to be found anywhere carries with it such a position as the defendant here contends for. The governmental authority of the State is limited to its own territory, and this branch of the argument is therefore answered by the fact of the fundamental difference between exercising sovereign power over property within the territorial limits, and insisting upon a right to bring property there from abroad, notwithstanding the prohibition by a lawful authority declared by the paramount law of the Empire to be in that regard supreme. I am, therefore, unable to agree with the contention that the Constitution leaves the Commonwealth powerless as against the States to regulate foreign trade and commerce; or phrasing it differently, that the King, as representing the Executive of the States, was not intended to be affected by the transference or creation of the powers enumerated in the Constitution; and I entertain no doubt that the Federal Parliament is authorized by appropriate legislation to prohibit the importation of goods by the State Governments.

This, however, does not conclude the controversy. The defendant took up the further position, that, assuming the power to control State importation, the Parliament had not exercised it, because, on the proper construction of the *Customs Act* itself according to acknowledged canons, the King is not bound. So far as the facts of this particular case are concerned, it appears that the defendant, without entry made or tendered, seized the goods *vi et armis* while in the control of the Customs within the meaning of the Act.

It would be sufficient to say that, whether or not the general provisions of the Statute as to prohibition and taxation were intended to apply to goods of the State or to goods intended for governmental use, the Commonwealth must at least have control of goods imported to the extent of ascertaining the ownership or the purpose of importation, and to test the assertion of the person actually introducing them into the country. Once that position is reached, it would obviously reduce the public administration of the Customs law to a chaotic condition if individual importers could under any pretence whatever legitimately use physical force in asserting their claims of unlawful detention, leaving the officers of the Crown no alternative but either to submit, which would be equivalent to the abandonment of all government, or else to employ countervailing force in order to overcome resistance. Still more serious would it be and more destructive of public peace and order if States, attempting as in this case to clothe their action with outward but futile forms of lawful authority, were permitted to enter into open conflict with the executive officers of the Commonwealth in the *bonâ fide* discharge of their ordinary functions. If the rights of States or individuals are infringed, the Constitution has provided a method of redress, and any other would inaugurate a reign of disorder. Such a state of affairs as would justify the defendant's action is entirely outside the limits of legal contemplation, and can form no basis of argument in a Court of law. Even on the assumption, therefore, that the State had a right to demand possession of the goods without payment of duty, and that this right was wrongfully denied by a refusal to restore possession, it was still a wrongful step in forcibly seizing them from the Customs, and the plaintiffs would be entitled to judgment. But, as I have said, the broader question is involved in this and the next case taken together as to whether the State is bound by the terms of the *Customs Act 1901*. The liability of the State to taxation may depend ultimately upon quite another consideration, but to determine the applicability of this Act as such to the Crown I propose to regard it from the standpoint of dutiability as well as prohibition. Prohibition of imports is enacted in secs. 50 to 57 inclusive. The prohibition is perfectly general. It is immaterial to whom the goods belong. The goods themselves are prohibited imports. I need not repeat what I have already said as to the impossibility of maintaining this prohibition with any effect if six entrances are provided whereby free and unchecked access is permissible. This clearly could not have been the intention of the legislature. Nevertheless, says the defendant, however unreasonable it may be, however inconvenient it may prove, the Parliament has omitted technically to close up those entrances by express or necessarily implied references to the State Governments, and so they exist in law. I reserve my opinion as to whether this objection may not receive an equally technical answer by the combined effect of the *Acts Interpretation Act 1901*, secs. 2 and 32, aided by the *Magdalen College Case*[20]. I do not enter upon that question because the question may be resolved by recourse to more enlarged principles.

In *The Municipal Council of Sydney v. The Commonwealth*[21] the learned Chief Justice said:—"It is manifest from the whole scope of the Constitution that, just as the Commonwealth and States are regarded as distinct and separate sovereign bodies, with sovereign powers limited only by the ambit of their authority under the Constitution, so the Crown, as representing these bodies, is to be regarded not as one, but as several juristic persons, to use a phrase which well expresses the idea."

I agree with those observations, which must govern, not only the construction of the Constitution itself, but also the laws made under it. The Constitution, in apportioning and distributing political powers, rights and duties, between Commonwealth and States, regards them as distinct and separate organisms for their several functions. This was necessary to the scheme of government it introduced, for operating as these several authorities do, at the same time, on the same territory, the same persons, and the same property, any other conception would produce confusion. No doctrine of law, however applicable to the purely unitary form of government, can, if inconsistent with the

great, essential and dominant purpose of the Federal Constitution, be allowed to prevail.

Any theory, therefore, is inadmissible which would permit the the States, merely because allegiance is owed to the same Crown, to claim entire exemption from the general operation of a federal law, regulating a matter of national concern, and made by virtue of a granted power of such a nature that the exemption would or might either utterly frustrate the legislation or render it practically ineffective.

The regulation of foreign trade and commerce and the imposition of Customs duties are necessarily powers of that character.

In *Pensacola Telegraph Co. v. Western Union Telegraph Co.*[22], *Waite* C.J. in words singularly appropriate to the present occasion said of the Government of the United States:—"It legislates for the whole nation, and is not embarrassed by State lines. Its peculiar duty is to protect one part of the country from the encroachments by another upon the national rights which belong to all."

If, then, State lines are not to be observed in the field of national regulation of external trade and commerce and duties of Customs, there can be no room for the contention that the Crown, as representing the States, is not bound without express words or necessary implication, and the argument must consequently fail through its want of relevancy.

For these reasons the acts of the defendant were, in my opinion, contrary to the law, and he is liable to the penalty imposed by the Customs Acts.

Higgins J.

It is unquestionable that, if this wire netting had belonged to a private person, it was subject to the control of the Customs, and that the defendant was liable to a penalty for removing it without passing a Customs entry, even if it was free from duty: *Customs Act 1901*, secs. 30, 33, 36. The defendant's counsel have wisely refrained from pressing the untenable point which was suggested in the case—that the wire netting was no longer in the control of the Customs after it had been placed on land vested in the Commissioner for Railways.

The question is, does the fact that the goods were removed by the order of the Governor of New South Wales in Council justify the removal? It is urged for the defendant that the *Customs Act* does not mention the King; that the King cannot be bound except by express words or by necessary implication; that even if the Commonwealth Parliament could by express words bind the King, it has not done so by the *Customs Act 1901*; and that therefore the State Government, as the King's agent, can ignore all the provisions of the *Customs Act*, can take goods without passing an entry, without even giving the Customs officials an opportunity of examining into the facts, and of ascertaining whether the goods are dutiable or not.

The goods in this case are in fact dutiable if imported by private persons; but for the purpose of dealing with the precise difficulty submitted in this special case, freed from other considerations, I shall assume that they are not dutiable. It would, indeed, be an extraordinary result if a lighter may take goods from a ship before it comes to the wharf, giving the Customs officials no information, leaving them in the dark as to the facts, and without any materials wherewith to decide whether the goods are liable to duty, or are prohibited as noxious to health or to morals, or as being made by prison labour, or even to decide whether they belong to the State. For ordinary imports the Customs officials have full power of examination (secs. 32, 49, 186), and of interrogation (secs. 234, 274). If

the defendant is right, the State Government can loftily ignore a prohibition or regulation of the importation of opium, of Kanakas, of goods or persons from an infected port; and the powers of the Commonwealth Parliament, designed for the good of the people of Australia, will be rendered futile and illusory. According to the argument for the defendant, if the Canadian Government or the New Zealand Government claim an exemption from Customs entry and from examination, as to goods belonging to it and sent to Australia, the claim should be allowed; for the goods are in law the King's goods. Moreover, if New South Wales imported goods to be landed in Adelaide, in another State,—say, for a Broken Hill railway—the goods must—as admitted in the argument—be landed without entry and without inspection.

Now, what are the limits to the doctrine by virtue of which the State Government claims a right to ignore the Customs machinery? The King, it is said, is not to be treated as bound unless the Statute says so, expressly or by necessary implication. But the State Government is not the King; nor is it an agent of the King so far as regards the function of regulating trade and commerce with other countries. The State Government is an agent of limited powers; the Commonwealth Government is also an agent of limited powers; and the question here is, not as between the King and any of his subjects, but between two agents of the King. One agent—the Commonwealth Parliament—has the exclusive power of regulating importation and of imposing Customs taxation; the other agent—the State Parliament or the State Government—has nothing to do with these subjects. The State does not enjoy the benefit of the King's prerogative rights except as to matters to which its agency extends; just as the Governor of a State is not protected as to matters beyond the authority confided to him: *Musgrave v. Pulido*[23]. Even if the State Parliament passed a law on the subject of importation, it would be void; and even if it passed a law on some subject properly pertaining to the State—such as the State railways—that law is invalid in so far as it is inconsistent with the laws of the Commonwealth as to Customs; for the Commonwealth law is paramount (*Constitution*, sec. 109). Moreover, the King is at the back of the Commonwealth as well as at the back of each State; and His Majesty is as much interested in the due execution of the powers of the Commonwealth, so that he may get revenue for Commonwealth purposes, as he is in the due execution of the powers of the State for the purposes of the administration of the railways and the lands of New South Wales. No English case has been cited to us, or is to me conceivable, in which this doctrine, as to the implied exception of the King's property and agencies, has been applied as between one agent of the King and another agent of the King, each of whom has a separate power for separate purposes of the King. The case is quite different when (*a*) the same Royal purse would take money for taxation as would pay, or when (*b*) the contest is between the King and his subjects. The doctrine is a mere rule of construction, and as such it gives way to necessary intendment. A local authority is in the same position as a subject for the purposes of the doctrine; for the moneys collected by the local authority are not to be spent by the King: *Weymouth, Mayor of v. Nugent*[24]. The King is entitled to take the benefit of Statutes which do not name him, if they are for his advantage, or for the public benefit; and the Commonwealth is entitled to the benefit of this principle, as much as the State Government is to the benefit of the converse principle, as to the burden of a Statute. The defendant argues as if the King were behind the State only, and not behind the Commonwealth—as if he were the King of the State and not of the Commonwealth. The case of *R. v. Wright*[25] shows sufficiently that, where the King's interest is as much on one side as on the other, the maxim of construction pressed on us for the defendant does not apply. It seems to me to be also correct to say that the doctrine of construction applies to the Government of the State in State Acts, to the Government of the Commonwealth in Federal Acts. In other words, the Crown to be considered in applying the doctrine to a *Customs Act* is the Crown of the Commonwealth—the separate "juristic person" referred to in *Municipal Council of Sydney v. The Commonwealth*[26]. To my mind, indeed, if secs.

106-109 of the *Constitution* be rightly considered, most of the difficulties as to the conflict of powers will vanish. The States' laws, and the States' powers to make laws, are all "subject to the Constitution"; and the Commonwealth laws made under the Constitution override any conflicting State laws made within the States' powers; and, so far as regards Customs machinery provided by the Commonwealth Parliament, the State officials must submit to it as if they were private persons. They are not servants of the King so far as regards importation; and the burden lies upon them, as it lies on other subjects of the King, of showing that they are exempted, without express words to that effect, from the obligations created by a Federal Act.

I ought to add that I feel no doubt as to the power of the Commonwealth Parliament, as well as of a State Parliament, to expressly bind the Crown by its acts.

Judgment for the plaintiffs.

Solicitor, for the plaintiffs, The Crown Solicitor for the Commonwealth.

Solicitor, for the defendant, The Crown Solicitor for New South Wales.

[1] [1904] HCA 17; 1 C.L.R., 406, at p. 417.

[2] 10 M. & W., 117, at p. 124.

[3] 2 Mason (U.S. Circuit Court), 311.

[4] 5 App. Cas., 102, at p. 111.

[5] [1904] HCA 50; 1 C.L.R., 208.

[6] Post.

[7] 10 M. & W., 117, at p. 124.

[8] 2 Mason, 311.

[9] 32 Fed. Rep., 9.

[10] [1887] USSC 85; 120 U.S. 489, at p. 496.

[11] (1905) A.C., 551.

[12] [1904] HCA 50; 1 C.L.R., 208, at p. 231.

[13] 5 App. Cas., 102, at p. 111.

[14] [1904] HCA 17; 1 C.L.R., 406, at p. 417.

[15] 10 M. & W., 117, at p. 124.

[16] 2 Mason (U.S. Circuit Court), 311.

[17] 1 Post, p. 818.

[18] [1905] USSC 184; 199 U.S., 437.

[19] [1813] EngR 653; 1 Dods., 320, at p. 339.

[20] 11 Rep., 66.

[21] [1904] HCA 50; 1 C.L.R., 208, at p. 231.

[22] [1877] USSC 167; 96 U.S., 1, at p. 10.

[23] 5 App. Cas., 102, at p. 111.

[24] 6 B. & S., 22, at pp. 32-33.

[25] 1 A. & E., 434, at p. 441.

[26] [1904] HCA 50; 1 C.L.R., 208, at p. 231.

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