HIGH COURT OF AUSTRALIA

Attorney-General of New South Wales

Vs.

Collector of Customs for New South Wales

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

23rd May 1908

Griffith C.J.

The plaintiff contends that the steel rails in question, which were purchased in England and imported into New South Wales for the use of the State in the construction of State railways, are not liable to Customs duties. The grounds taken in the special case are:—(1) That the rails were the property of His Majesty, and that the Sovereign is not bound by the Customs Acts; and (2) That the rails were exempt from duty by virtue of sec. 114 of the *Constitution*.

The first ground has been sufficiently dealt with in the case of *The King v. Sutton*[1], and I do not think it necessary to add anything on this point.

The point raised under sec. 114 is a more difficult one. That section provides that "A State shall not ... impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State." The Attorney-General says that the rails in question are property of the State of New South Wales, that duties of Customs are a tax on property, and that the rails are therefore exempt. The defendant answers that duties of Customs are not a tax imposed on property in the sense in which those words are used in that section, and, further, that the section applies only to property already within the limits of the Commonwealth, and not to goods in process of coming within those limits. It is pointed out that, if full effect were given to the Attorney-General's contention, it would be in the power of the States by becoming general importers of goods seriously to impair, and indeed practically destroy, the Customs revenue of the Commonwealth, and, further, that the power of the Commonwealth with regard to external trade would, so far as it is exercised by means of duties of Customs, be in reality, although declared to be paramount, subject to unlimited interference from the States. Reference was made on both sides to the case of *South Carolina v. United States*[2] in which the extent of the prohibition of taxation by Congress of the property of the States, which is held to be implied by the Constitution, was much debated. Counsel for the Attorney-General were disposed to concede that the express prohibition of sec. 114 must be limited, as the majority of the Supreme Court of the United States held in the case just cited with regard to the implied prohibition, to property employed in the ordinary affairs of government as understood at the date of the establishment of the Commonwealth. There are, however, difficulties in the way of implying any such limitation upon the terms of sec. 114, just as there are (as was pointed out in the *Federated Amalgamated Government Railway and Tramway Service Association v. New South Wales Railway Traffic Employés Association*[3]) in the way of saying that any function which a Sovereign Government assumes to exercise within the limits of its powers is not an ordinary function of government. But, even with this limitation, the prohibition of the section would extend to duties upon goods imported

for the purposes of government departments, such as the Public Works and Education Departments, the Printing Office, Gaols, Police, Asylums, and many others, and this, whether the goods were directly imported into the State itself or through another State, as for instance, through Port Pirie in South Australia in transit to Broken Hill in New South Wales, or through Brisbane in Queensland in transit to the Northern Districts of New South Wales.

The defendant points out that the power to impose taxation conferred by sec. 51 (II.), as well as the power to regulate importation conferred by sec. 51 (I.), are paramount, and are in form unlimited, and that they apply as well to the Governments of the States as to private persons (as was held in *The King v. Sutton*[4]). If, then, the construction sought to be put upon sec. 114 by the Attorney-General is correct, there is an apparent contradiction of a very serious character. If, however, the words of sec. 114 are capable of a construction consistent with giving full effect to the plain intention of sec. 51 (I., II.), that construction should be preferred.

Sec. 114 must, no doubt, be construed as an exception from sec. 51 (II.), but the extent of the exception is the point to be determined.

Are then the words of sec. 114 capable of two constructions? There is no doubt that in some contexts the words "impose any tax" might be capable of application to duties of Customs. Nor is there any doubt that the word "taxation" in sec. 51 (II.) includes the levying of duties of Customs. But these duties are nowhere in the Constitution described as a "tax," unless the use of the word "taxation" in sec. 51 (I.) is such a description of them; nor is the levying of them ever spoken of as the imposition of a tax on property. Sec. 86 speaks of "the collection and control of duties of Customs and of Excise." Secs. 88, 89, 90, 92, 93, 94, 95, all speak of the "imposition" of duties of Customs. Such duties are imposed in respect of "goods" and in one sense, no doubt, "upon" goods, which is only another way of saying that the word "upon" is sometimes used as synonymous with "in respect of." In the same way the word "upon" or "on" is used colloquially in speaking of stamp duties, succession duties, and other forms of indirect taxation, as taxes on deeds, &c., or on real and personal property. Yet it is recognized that these forms of taxation are not really taxation upon property but upon operations or movements of property. See, for instance, the cases of *The Attorney-General for Quebec v. Queen Insurance Co.*[5], and *United States v. Perkins*[6]. In the last mentioned case it was held that a succession duty is not, in substance, a tax upon property, and consequently that the imposition by a State of such a duty in respect of property bequeathed to the United States was not obnoxious to the rule, implied under the Constitution, that a State cannot tax the property of the United States. After referring to some decisions of State Courts to the same effect the judgment of the Court proceeded[7]:—"Such a tax was also held by this Court to be free from any constitutional objection in Mager v. Grima28 How., 490, 493., Mr. Chief Justice Taney remarking that the law in question is nothing more than an exercise of the power which every State and sovereignty possesses, of regulating the manner and terms within which property, real and personal, within its dominions may be transferred by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. ... If a State may deny the privilege altogether, it follows that when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy. To the same effect is United States v. Fox394 U.S., 315.. We think that it follows from this that the Act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it."

So far there seems no reason to suppose that the word "tax" was used, inexactly, in sec. 114 to denote duties of Customs.

The distinction between direct and indirect taxation is well enough known. Direct taxation is taxation by way of pecuniary payments directly imposed in respect of persons or things subject to the jurisdiction of the taxing authority, and the burden of which is designed to fall upon the taxpayer himself. Such taxes in respect of things are frequently, and not inaccurately, called property taxes, or taxes "on" property. Common instances are land tax and municipal rates. Similar taxes levied *ad valorem* upon the value of personal property were for many years imposed in New Zealand and in many of the States of the American Union. The *Canadian Constitution* (*British North America Act*, sec. 125) provides that no lands or property belonging to Canada or any Province shall be liable to taxation. The powers of the Provinces being limited to imposing direct taxation, the meaning of the prohibition as regards them is not open to controversy. With regard to the power of the Dominion, however, it might have been contended that the prohibition extended to indirect taxation through the Customs of goods belonging to the Provinces. We are informed that it is the universal practice in Canada to levy Customs duties on such goods. Several Statutes of the United States were also referred to, in which a remission of Customs duties upon State property is expressly authorized. These instances appear to show that in the United States and Canada, at all events, the prohibition (in one case implied and in the other express) of the taxation of State or Provincial property has never been understood as applying to duties of Customs.

Again, the words "property belonging to the Commonwealth," "property belonging to a State," seem, *primâ facie*, to import property lying and being within the Commonwealth. Neither the Commonwealth nor a State can impose a tax upon property which is not within the geographical limits of its jurisdiction. Even if they can impose a tax upon a resident in respect of property situated elsewhere, such a tax is a personal tax, and cannot be properly regarded as a tax upon his property. It was contended, however, that duties of Customs are a tax upon property within the Commonwealth, since the goods must have been imported before the liability to duty can arise. But this, although true in one sense, is not true in any relevant sense. The payment of the Customs duty is an obligation or condition which must be fulfilled before the goods can lawfully form part of the stock or mass of goods in the country, although for convenience they are allowed to be retained in bond in a King's warehouse until payment. Adapting the words of Chief Justice *Taney*, cited in *Perkin's Case*[10], I say that a Customs law from this point of view is nothing more than an exercise of the power the Commonwealth possesses of regulating the manner and terms on which goods may be brought into the Commonwealth.

For these reasons I am of opinion that the levying of duties of Customs on importation is not the imposition of a tax upon property within the primary and literal meaning of sec. 114, standing alone. I am further of opinion that, even if it is an imposition of a tax on property within the primary and literal meaning of that section, yet that meaning is not the only or the necessary meaning, and that, for the reasons already given, it must be rejected as being inconsistent with other plain provisions of the Constitution. I think, therefore, that sec. 114 does not apply to duties of Customs. This was the view taken by *Stephen* Acting C.J. in the case of *Attorney-General v. Collector of Customs*[11].

A further argument was addressed to us based upon the doctrine laid down by this Court in the case of *D'Emden v. Pedder*[12] and re-affirmed in *Baxter v. Commissioner of Taxation (N.S.W.)*[13], "that when a State attempts to give to its legislative or executive authority an operation which, if valid, would fetter, control, or interfere with, the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent

invalid and inoperative," which was applied by this Court in the *Federated Amalgamated Government Railway Service Association v. New South Wales Railway Traffic Employés Association*[14] to the case of interference by the Commonwealth with State instrumentalities. It was contended that the importation of railway material from beyond the Commonwealth is, or may be (as to which the State is the sole judge), necessary for the efficient construction and carrying on of State railways, and that the imposition of duties of Customs upon such importation is consequently a control of, or interference with, a State function. This argument, if valid, applies, as already pointed out, to all goods which any State may think fit to import into any part of the Commonwealth for the purposes of any department of the State.

The doctrine relied upon is, as has several times been pointed out by this Court, a rule of construction founded upon necessity. In one aspect it is analogous to the 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. The word "expressly," as used in the rule, does not, of course, mean that the power to be interfered with must be mentioned *eo nomine*. If a power conferred upon the Commonwealth in express terms is of such a nature that its effective exercise manifestly involves a control of some operation of a State Government the doctrine has no application to that operation. Sec. 51 of the *Constitution* confers upon the Parliament many powers of this nature, *e.g.*, the power to control quarantine (*ix.*), weights and measures (*xv.*), immigration (*xxvii.*). The power to make laws respecting trade and commerce with other countries and among the States (*i.*) is of the same kind, and necessarily involves the power to interfere with the operations of the State Governments so far as to make effectual any condition or prohibition imposed by the Commonwealth upon importation. Taxation by means of Customs duties is in law, as well as in fact, a mode of regulating trade with other countries. It follows that it was the intention of the legislature that the right of State Governments to import goods should be subject to the control of the Commonwealth, so that the rule in *D'Emden v. Pedder*[15] has no application.

Moreover, the rule, as hitherto stated, has reference only to the performance of the functions of government within the Commonwealth, beyond which the functions of a State Government, *quâ* Government, do not extend. Although, therefore, the rule prohibits the Commonwealth in certain cases from interfering with the free exercise of the executive powers of a State within the State in making use of any means or instrumentalities lawfully at its command, it has nothing to say to the question whether any specific thing may be brought within the State so as to become such a means or instrumentality. The interference complained of in the *Federated Amalgamated Government Railway Service Association v. New South Wales Railway Traffic Employés Association*[16] related to a function performed wholly within the State, and as to which the Court thought that no power to interfere was given either expressly or by necessary implication. That case, therefore, has no application to the present.

For these reasons I think that our judgment must be for the defendant.

Barton J.

In the case of *The King v. Sutton*[17] judgments were delivered yesterday by the several members of this Court which relieve us from giving extended reasons for our opinion that in this case question 1 (paragraph 11 of the special case) must be answered in the affirmative. I desire, however, to add a few words before passing to the other questions. In addition to the power of taxation, exclusive as to the Customs (sec. 90), the power of regulating commerce with other countries and among the States is conferred on the Commonwealth. That power is inherently exclusive so far at the least that it

cannot be exercised by any single State so as to operate generally. Its exercise, therefore, as regards the conditions on which trade with other countries may be regulated, on even terms as to all parts of the Commonwealth, must be exclusive. For this position authority is unnecessary, although it abounds. The commerce power, indeed, is the real authority for the prohibition of any particular importation, and is largely interwoven with the sole power to impose import duties in the practical regulation of importation. Now, taking the two powers together, with the light thrown on them by sec. 112, it clearly appears to have been the intention of the Constitution to place under the control of one Parliament the entire subject of imports, (I restrict this statement to the mere necessity of the occasion) and the decision, what should be admitted or excluded, and what should be the terms of admission. That being so, and bearing in mind that every grant of power carries with it all necessary protection for its effective exercise, can it be supposed that concurrently with such granted control a licence was given to the Executive of each State to nullify the prohibitions or defeat the exercise of the regulative discretion of the Federal Parliament? Consider the effect of such a constructive licence. With what approach to uniformity or consistency—the very objects of their existence—could the express and exclusive powers of the Australian union be exercised? Without attempting to discuss the inevitable results in the case of other federal powers, can it be said that a fiscal or a commercial policy of common value to the whole people could be even framed—much less carried into effect—by any Federal Government or Parliament? The slightest consideration must convince the impartial mind that the construction under which it would be, not only possible, but easy to paralyse the most vital of federal powers, is not within the bounds of reason.

If the right claimed were once conceded, it would be in the hand of one State to establish a discrimination between other States and herself with the object of discouraging commerce with one neighbour or encouraging it with another, or of gaining an advantage over her sisters by importing free the raw material of an internal industry of her own, to the defeat of that equality of unhampered interchange between the States which was one of the first objects of the people in federating. And the prohibition imposed on the federal power by sub-sec. (II.) of sec. 51 could be nullified at the will of every State in turn Moreover, the chief use of the power of Customs regulation, and one of the chief uses of the commerce power—namely, the raising of a revenue for the support of the general government—would be frustrated by the exercise of the licence claimed, to the maiming if not the ruin of that revenue. This Court stated the principle truly when it said, in *D'Emden v. Pedder*[18]:—"With respect, however, to matters within the exclusive competence of the Federal Parliament no question of conflict can arise, inasmuch as from the point at which the quality of exclusiveness attaches to the federal power the competency of the States is altogether extinguished." And, inasmuch as this principle in its fulness is an essential condition of the safety of the Constitution, the reasons for its maintenance are in my judgment as applicable to the claim put forward in question 1, as to the question of instrumentalities of government, when once the field of action is granted to the federation *exclusively*.

I pass now to consider the contention that State railways have become, as was decided by this Court in the case of the *Federated Amalgamated Government Railway and Tramway Service Association v. New South Wales Railway Traffic Employés Association*[19], instruments in the carrying on of State governmental functions; that the acquisition of rails for the purposes of such railroads is a means of performing that function; that the exaction of Customs duty on the import of rails intended for such roads is an interference with the performance of the function, and that there is no express or necessarily implied power in the Constitution warranting the interference. Mr. *Knox* truly said that, unless the power were found, the interference, if there is one, is unconstitutional. The following words in the judgment of the Supreme Court of the United States, spoken by *Brewer* J., exactly apply. In a dual system of government, "There are certain matters over which the national

government has absolute control, and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to them the national government is powerless": *South Carolina v. United States*[20]. Where a grant of power is made, this leading principle dictates its scope. If the grant is exclusive the control is absolute. Any action by the State, such as the attempted importation of goods, without observance of the condition which the grantee of the absolute control has imposed, is itself an interference with the exercise of the control. In this case the condition is the payment of the duty prescribed.

Further, I am of opinion that the State has not made out its claim to have these rails considered an instrument of its governing functions. It cannot be contended that the Government of New South Wales has any extra-territorial powers. But to sustain the claim made, the very purchase of the rails in England, or perhaps Belgium, and their transmission, would have to be considered as exercises of governing power. At what stage before their incorporation in the railroad itself they would begin to be a means of Government it is difficult to see. The railways themselves, including their rolling stock, are such; but can we go further? I for one find it hard to say at what earlier point the instrumentality begins, unless we go to the quite unwarranted length of determining that its starting point is the purchase abroad. But, however that may be, the doctrine of State instrumentality cannot be held to cut down by implication a federal power where that power is by the terms of its grant exclusive.

Now as to sec. 114 of the *Constitution*. I must first guard myself against being supposed to agree with Mr. *Pilcher* that the prohibition applies only to property of Commonwealth or State which is a means or agency of Government as ordinarily understood. That position may be correct. On the other hand, it may be that the framers of the Constitution intended to protect all such property as either power might have or acquire, whether used or not in the ordinary essential functions of Government. There is this difficulty in the way of that construction. As their respective Constitutions stand it is open to the States to acquire and hold property for purposes without number. That is not so in the case of the Commonwealth, and in that aspect sec. 114

would scarcely seem to be a compact fair to the Commonwealth. On the other hand, as Mr. *Gordon* urged, if the prohibition in sec. 114 is co-extensive with the effect of the "instrumentality" doctrine, there does not appear to have been much reason for its insertion, inasmuch as the doctrine itself involves the implication of such a prohibition to the extent of the property used for governmental purposes. If then there was reason for the express provision, as *primâ facie* one would suppose, should it be limited in the way suggested?

It is not necessary to decide that question in the present case, so I leave it open as far as I am concerned.

The effect which the plaintiff seeks to give sec. 114 is that a "tax on property" within the meaning of that section includes duties of Customs, and hence that these rails were exempt. To sustain this position it is necessary to show more than that the words of the section are capable of including Customs duties. It must be shown that the words do include such duties, so as to form an exception from the Customs power elsewhere expressed to be exclusive. First, there is the obstacle that the Constitution will primarily be taken to mean different expressions in different senses. Where import duties have been indicated the Constitution has elsewhere uniformly used the term "duties of Customs." There is but one exception, and that is clearly by way of distinction. It is in sec. 112. There, after describing the federal import duties as "uniform duties of Customs"—an oft-recurring expression in this document—a State is authorized to levy, subject to annulment by the Federal

Parliament, "on imports or exports, or on goods passing into or out of the State"—that is by inter-state traffic—"such charges as may be necessary for executing the inspection laws of the State," and the net produce of "all charges so levied" is to be for the use of the Commonwealth. Observe that what would before Federation have been a Customs duty imposed by a State becomes, in contradistinction to a Customs duty imposed by the Commonwealth, a charge levied by a State on imports or on goods passing into the State. There is here a close attention to the change of conditions, and with it a strict distinction between the federal duty on imports—the "duty of Customs imposed"—and the limited State impost,—the charge on imports, &c., levied. It seems, in view of such nicety of distinction, more reasonable to infer that the terms, "duties of Customs" and "tax on property" were intentionally differentiated, than to infer that in the section next but one following that marked by such careful distinctions, a clumsy blunder in drafting should have been made. It is true that the general power in sec. 51 (II.) is conferred in the word "taxation." But that is probably the only word which would include the four classes of burdens which the corresponding power in the *United States Constitution* has categorically termed "taxes, duties, imposts and excises." But where the generic term is abandoned for a specific one, the *Australian Constitution* carefully and distinctively points to the specific class of burden that it permits or forbids. Sec. 55 is an instance of the use of both the generic and the specific in their places; and sec 53 is an instance of the generic only.

If, however, the words "tax on property of any kind" in sec. 114 raise an ambiguity, then that is solvable according to ordinary principles. Looking at the fact that the powers to impose Customs duties and to regulate commerce with other countries are exclusive, to construe sec. 114 in the way contended for would be to cut down in that section what the exclusive grant in itself involves, namely, the absolute power to select the subjects and prescribe the quantum of Customs duty. This is so improbable a construction that I think the words must be construed in a sense at least more usual and more ordinary than that which the plaintiff attributes to them. Although the Customs duty may be in fact imposed "on" the article itself, as contended on an elaborate analysis of the judgment of *Marshall* C.J. in *Brown v. Maryland*[21], and although the goods which pass the Customs after entry may be "property," yet it is not usual to call a duty of Customs a tax on property, or indeed to call a tax on property a duty of Customs, when one finds either term standing by itself in a document. But when one finds the two terms in the same document he is the less likely to use them interchangeably, unless indeed he finds them so used in the context, or unless the context supplies some other good reason for inferring a looseness of expression.

I will not further deal with sec. 114, of which my learned brother the Chief Justice has given so full an exposition. My observations on it would have been briefer had not this case demanded our closest attention, both from its present importance and from its necessary bearing on the future government of Australia.

I am of opinion that our answers should be: To the first question, yes, observing that the expression "the Crown" there used is really a misnomer for the State, which is in substance the plaintiff: to the second question, no: and to the third question, yes: and that judgment should be for the defendant on the whole case.

O'Connor J.

The matter in controversy is whether the Commonwealth Customs Department are entitled to charge the Government of New South Wales with Customs duties on certain steel rails the property of and imported by that Government for use on the railways of the State. The parties have agreed that their

rights are to be determined in accordance with the view which the Court may take of the following questions of law submitted for decision in the special case:—

(1)

Do the provisions of the *Customs Act 1901*, and the *Customs Tariff 1902*, affect the Crown as representing the community of New South Wales in the sense that those provisions require the Crown to pay duties of Customs under the circumstances stated above?

(2)

Were the steel rails exempt from duties of Customs by virtue of sec. 114 of the *Constitution*?

(3)

Were the said steel rails liable to duties of Customs?

The first question is answered by the judgment of the Court in *The King v. Sutton*[22], delivered by this Court at its present sittings. For the reasons there stated that question must be answered in the affirmative.

The considerations involved in the third question make it convenient for the purposes of my judgment to deal next with that. In putting it in the broad form adopted the parties have asked the Court to view the matter apart from the provisions of sec. 114 of the *Constitution*. The plaintiff rests his case upon the principle expounded by this Court in *D'Emden v. Pedder*[23], and applied in several cases since then, notably in that of the *Federated Amalgamated Government Railway and Tramway Service Association v. The New South Wales Railway Traffic Employés Association*[24]. In the case last named the principle is thus stated in the judgment of the Court, quoting *D'Emden v. Pedder*[25], as follows[26]:—"It follows that when a State attempts to give to its legislative or executive authority an operation which, if valid, would fetter, control, or interfere with, the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent invalid and inoperative. And this appears to be the true test to be applied in determining the validity of State laws and their applicability to federal transactions."

The judgment goes on to point out that, although in *D'Emden v. Pedder*[27] the question was as to an attempted invasion of the ambit of Commonwealth authority by a State authority, the doctrine was equally applicable in the converse case where there was an attempt by the Commonwealth to invade the ambit of the State authority. Taking that principle as applicable, the plaintiff's contention is that the Government railway system is an instrumentality employed in the carrying out of one of the functions of the State Government, and that the imposition of a Customs duty on the rails required in the working of that system is such an interference with the exercise of the function as must be taken to have been impliedly prohibited by the Constitution. Since the judgment of this Court in the case of the *Federated Amalgamated Government Railway and Tramway Service Association v. The New South Wales Traffic Employés Association*[28] it must be taken as authoritatively settled that the systems of State railways in each State are governmental functions of the State, recognized as such by the Constitution. It may also be conceded for the purposes of the argument that the imposition of Customs duties on the importation by the State of rails the property

of the State amounts to an interference with the unfettered exercise of the State's power of purchasing rails outside Australia. But before the principle can be applied we must ascertain by a consideration of the Constitution as a whole the extent of the Commonwealth power to impose duties on importation. In this connection must be borne in mind the maxim referred to in the judgment in *D'Emden v. Pedder*[29]:— "It is only necessary to mention the maxim, quando lex aliquid concedit, concedere videtur et illud sine quo res ipsa valere non potest. In other words, where any power or control is expressly granted, there is included in the grant, to the full extent of the capacity of the grantor, and without special mention, every power and every control the denial of which would render the grant itself ineffective."

The power to levy duties of Customs is conferred by two sub-sections of sec. 51 of the *Constitution*. It is included in the word "Taxation" in sub-sec. (II.), construing that word in its widest sense. It is also an exercise of the power to make laws relating to trade and commerce with other countries (sub-sec. (I.)). The language of these sub-sections is certainly wide enough to cover the imposition of duties on the property of a State even on property necessary for the carrying out of the governmental functions of a State.

But it is urged that the interpretation of the general words used in their wider sense will bring about such an interference with the right reserved to the State to manage its own railways that the Court, applying the doctrine in *D'Emden v. Pedder*[30], will read the words in a sense sufficiently restricted as to preserve the uninterrupted exercise of the State power as it was before the inauguration of the Commonwealth. In my opinion, that contention cannot be maintained. In the distribution which the Constitution effects of all the governmental powers of the Australian people between the Commonwealth and the States some powers are left to the States complete and uncontrolled, and some are transferred to the Commonwealth, but amongst those powers left to the States some must necessarily be reserved in a restricted form. Wherever it is necessary for the effective exercise of a Commonwealth power that a State power should be restricted, it must be taken that the Constitution intended that it was to be reserved to the State in that restricted form. In such case the general words conferring the Commonwealth power will be interpreted in the wider and not in the narrower sense. It is therefore essential at the outset to see what is necessary for the effective exercise of the Commonwealth power to impose Customs duties and to regulate trade and commerce with foreign countries. In this connection the other powers expressly conferred on the Commonwealth may be considered, and, taken as a whole, they vest in the Commonwealth the power of controlling in every respect Australia's relations with the outside world. The control of trade and commerce with other countries, the imposition of Customs duties, immigration, quarantine, and external affairs, are all different aspects of Australia's relations with other countries. The manifold and varied activities which are recognized as functions of the State in Australia were well known to the framers of the Constitution, and it cannot be supposed that it was intended that the Commonwealth control of Australia's relations with other countries should be subject to the exception that it should have no operation in so far as State Governments in the exercise of their governmental functions were concerned. If the power of the Commonwealth were to be taken as so restricted, then, in regard to any goods which a State deemed necessary for the carrying out of its governmental functions, not only would the importation be free of duty, but the Customs control and examination of the goods would be at an end, general prohibitions on importation could not be applied, and, on the same reasoning, neither quarantine laws nor immigration laws could be allowed to stand in the way of the State. If the exercise of Commonwealth power were to be so restricted, it is difficult to see how Commonwealth control could be comprehensive and effective, how it could ever frame or carry out any general policy in respect of the finances, the industry, the health, or the trade of the whole Commonwealth. In other words, the power conferred could not be effectively

exercised unless State dealings with countries outside Australia were within the control of the Commonwealth.

It being necessary, therefore, for the effective exercise of the Commonwealth power that the importation of the goods of a State by a State should not be exempt from the control of the Commonwealth, it follows that the Commonwealth power must be taken to include the right of restricting to that extent the rights which the State had previously exercised, and it must be taken that to that extent the State control of its railways has in the distribution of powers under the Constitution been restricted.

As to the third ground, therefore, I have come to the conclusion that, apart from sec. 114, the *Constitution* authorized the enactment of the *Customs Act 1901* imposing duties on steel rails imported by the Government of a State.

The question remains, were the steel rails exempt from duty by virtue of sec. 114 of the *Constitution*? On this part of the case I shall add very little to what has been said by my learned brother the Chief Justice, whose judgment I have had the opportunity of reading, and in which I entirely concur. In the interpretation of sec. 114 I base my judgment on this ground. In the widest sense of the word no doubt a Customs duty is a tax, but in the circumstances under consideration it is in its nature and essence more properly a charge made in respect of the landing of the goods in Australia. But, used in relation to property and in the expression "tax on property," there is a narrower meaning of the word well known and recognized. A tax on property in the strict and narrower meaning is an exaction made in respect of the holding or ownership of property. That meaning would not include Customs duty on goods imported. Whether the word "tax," being a general word and capable of the wider or of the narrower meaning, is to be interpreted in its wider or in its narrower sense, is a question to be determined as in all other cases where a legislature has used an ambiguous expression, namely, by a consideration of the context, of the other sections of the Constitution, and of its whole scope and purpose. On that view I have come to the conclusion that to construe the expression "tax on property" in the wider sense as including Customs duties would be to restrict, in the manner I explained in the earlier part of my judgment, the effective exercise of the power clearly given to the Commonwealth of the exclusive control of all importation into Australia.

For these reasons, in my opinion, the second question must be answered in the negative, and on the whole case judgment must be entered for the defendant.

Isaacs J.

With every question discussed, except one, I have already dealt in the previous case: *The King v. Sutton*[31]. But this additional question gives rise to by far the most difficult of all the problems we have had to solve. It is whether sec. 114 of the *Constitution* prohibits the Commonwealth from levying Customs duties upon goods imported by the States for governmental purposes. The prohibition is not expressly claimed for any goods other than those intended for governmental purposes, but there is no such constitutional limitation express or implied as to the property protected. If the concluding passage of the section applies to Customs duties at all, it must apply without restriction to State property of every description that is imported from abroad. The phrase that gives rise to the doubt is the expression "any tax on property of any kind belonging to a State," and it is urged with considerable force that these words, taken in the literal sense, include a Customs duty, and that the duty is a tax, and the goods upon which it is imposed are property, and that this sense should not be departed from. If a Customs duty falls within the meaning of the word "tax" in

sec. 114, I am of opinion that the plaintiff's argument is made good. I see no escape from the contention that a Customs duty, as ordinarily understood and as enacted in the Commonwealth Acts, is a duty upon property, and if the goods belong to the State, the prohibition would apply. I am unable to accede to the view presented that a Customs duty is merely a tax on an operation, namely, the act of importation, and nothing more.

A Statute might doubtless be so penned as to apply the tax to the act of importation only, and not to operate directly on the goods, but that, besides affording room for argument even then as to the substance of the enactment, would not be an ordinary *Customs Act*, nor is the Statute now in question of that nature.

The *Customs Tariff 1902* in terms imposes the duties on goods imported. It is nevertheless urged that the goods considered as property are not the subject of taxation, but only the subject of importation, and that the importation and nothing more is the subject of taxation. This a fundamental argument, and as it affects indefinitely the constitutional relations of Commonwealth and States, it renders necessary a careful examination into the nature of Customs legislation as understood in England for some centuries.

The whole course of English precedent and authority appears to me to support the view that the tax is intended to fall, and does fall, on the goods in the same sense as is ordinarily understood by a tax on goods, and not on the mere act of importation.

It is true that importation is essential to the claim for duty, but nowhere do we find that it is the intangible act of importation which is the subject of taxation, but always the concrete property imported. The duty is on imports. *McCulloch's Commercial Dictionary* defines Customs as:—"Customs are duties charged upon commodities on their being imported into or exported from a country." Importation is an event or occasion which renders the property liable to taxation, just as if land were taxable if and when used for business purposes. In such case it might in an unprecise and familiar way be said the use for business operations was taxed, but the real subject of taxation would be the land. *Hamel on the Law of Customs*, at p. 29, says:—"The Customs duties are supposed to have been, at the commencement, small sums paid by the merchant for the use of the King's Warehouses, weights, and measures. But these were extended in course of time and commuted into an impost upon merchandise itself, the consideration given by the Crown being permission to its own subjects, to travel out of the realm with their merchandise, and to foreign merchants, to import goods into the kingdom," &c. The same learned author speaking of drawbacks says, at p. 160:— "It is scarcely necessary to explain, that the familiar term drawback is applied to repayments of duties or taxes previously charged on commodities, but from which they are relieved on exportation, that they might be disposed of in the foreign market on the same terms, as if they had not been taxed at all."

Bates Case[32], a prosecution for not paying an import duty on currants, ultimately led in 1610, as pointed out by *Broom on Constitutional Law* (at p. 302 and following pages), to the Petition of Grievances addressed to James I., which referred to "taxing or imposing upon the subject's goods or merchandizes" and to "impositions either within the land, or upon commodities either exported or imported by the merchants."

The petition requested "that a law may be made during this Session of Parliament, to declare, that all impositions set, or to be set upon your people, their goods or merchandizes, save only by common assent of Parliament, are and shall be void," &c. *Broom*, also, at p. 371, quotes *Hargraves*

as remarking "James I. claimed the right of imposing duties on imported and exported merchandize by prerogative," and in discussing the question, states it thus "May the Sovereign jure coronæ tax our imports"? In the course of a learned discussion he quotes the Statute 16 Car. I. c. 8, granting tonnage and poundage to the King, and declaring and enacting that "it is and hath been the ancient right of the subjects of this realm that no subsidy custom impost or other charge whatsoever ought to or may be laid or imposed upon any merchandize exported or imported by subjects denizens or aliens without common consent in Parliament." Similarly was it so recited in sec. 6 of the Act 12 Car. II. c. 4. In *Sheppard v. Gosnold*[33] it is said that Queen Mary laid an imposition upon cloth, and James I. laid an imposition upon currants, "and so (upon the supposition that by the Common Law merchandize might be charged with Custom) possibly like impositions might be laid on Wax or any other Merchandize." That case, as it seems to me, places the matter in a very clear light. The Court thus summarizes the grounds of dutiability[34]:—"From those words (i.e., words of the Act of Car. II.) I observe, that wines liable to pay tonnage by the Act, must have these properties:— 1. They must be wines which shall come or be brought into the ports or places of the Kingdom. 2. They must come or be brought into such ports or places as merchandize, that is, for sale and to that end," &c., and then follow other grounds peculiar to the Act itself. It can scarcely be doubted that the Court were of opinion the duty was on the property itself.

I pass from these early expressions of the nature of the tax to one that is perhaps the most recent. In *Algoma Central Railway Co. v. The King*[35] Lord *Macnaghten*, speaking for the Privy Council, and dealing with a Customs Act of Canada, says:—"The duty is a duty imposed on goods imported." His *Lordship* does not say on the act of importation, but on the goods that are imported. The conception, therefore, of English law as to a Customs duty has for centuries been that of a tax upon goods, that is, upon the property.

Turning to the Constitution itself, though the language is not invariable, I read secs. 93 and 95 as contemplating that Customs duties are imposed on the goods themselves.

The framers of the *American Constitution* had before them the history of Customs duties and the enactments imposing the duties, and they correctly and tersely framed the prohibition to the States against imposing duties upon imports. I can see no distinction between duties imposed on "Merchandize ... imported" as in the Act of Car. I., or "rates imposed upon merchandize imported" as in the Act of Car. II., on the one hand, and "duties on imports" in the *United States Constitution* on the other. One of the Imperial Statutes which caused dissatisfaction in America was 4 Geo. III. c. 15, and that enacted there should be raised certain rates and duties "for and upon all white and clayed sugars ... which shall be imported or brought into any Colony or Plantation in America." The phrase "duties on imports" was only a concise mode of expressing the ordinary operation of Customs Acts as to goods imported.

In *Brown v. Maryland*[36] *Marshall* C.J. declared that a duty on imports meant more than a duty on importation, it extended to a duty on the thing imported. It is to be observed, if it be material, that he even went further and determined that a State Act requiring a licence upon the operation of selling imports was equivalent to imposing a tax on the imports themselves and was repugnant to the *Federal Constitution*. In *Almy v. California*[37], which followed *Brown v. Maryland*[38], *Taney* C.J. speaking of the earlier case said:—"the Court decided that the State law was a tax on imports." Here the property protected is defined in the widest possible terms, and includes goods whether in the character of imports or not.

I am, therefore, clearly of opinion that Customs duty is imposed upon the goods themselves, and if

this were all, I should hold the case came within sec. 114.

But is a Customs duty a "tax" within the true meaning of the section? In the broadest sense a tax it undoubtedly is, and if the word "tax" stood alone it would be impossible to deny its inclusion of Customs duties as well as of a direct tax on property after incorporation in the general stock of the country. But the word "tax" and its plural "taxes" are not words of invariable signification indicating any exercise whatever of the power of taxation; they are not infrequently used to denote a particular species of imposition, in contra-distinction to duties, and to duties of various kinds. The word "taxation," when used to confer a governmental power, carries the amplest meaning; but "tax" may or may not be as wide. The word must be looked at in relation to its surroundings, it must be considered with respect to the object of the clause in which it stands, and the results which would flow from one construction or the other; in short, its meaning must, like any other word not of invariable signification found in a document, be ascertained by interpreting it by the light of the whole instrument. There are many Statutes in which "taxes" may be found differentiated from "duties." Some of these enactments are of special value in this connection because they refer to constitutional powers. The Act 6 Geo. III. recited that several of the Houses of Representatives in the American Colonies had claimed the sole and exclusive right of "imposing duties and taxes" and thereupon declared Imperial paramountcy. The Act 14 Geo. III. c. 83, making provision for the Government of the Province of Quebec, while enacting that a Legislative Council might be appointed with power to make Ordinances for the peace welfare and good government of the Province, prohibited the Council from laying "any taxes and duties" within the Province except certain "rates and taxes" within Towns and Districts. By a later Statute, 14 Geo. III. c. 88, the British Parliament itself, for the purpose of defraying part of the cost of Government in Quebec, imposed certain "rates and duties" of Customs upon goods therein mentioned. They were not called taxes. Without attempting, for I have no opportunity, to make any extensive enumeration of Statutes which present the distinction between the words referred to, I may mention two others far removed in time and character from those just referred to. They indicate, however, how the legislature sometimes recognizes the restricted meaning of the word "tax." The Act called the *Taxes Management Act 1880* (43 & 44 Vict. c. 19) used the word "taxes" in two different senses. In its short title, as is seen, the word is employed in a comprehensive sense; but in the full title to the Act a narrower sense is found. It styles itself "An Act to consolidate enactments relating to certain Taxes and Duties," &c. Customs duties are not included, others are. The other Act is called the *Revenue Act 1889* (52 & 53 Vict. c. 42), and is an Act to amend the law relating to the Customs and Inland Revenue, &c. Part I. is headed "Customs," and under this Part, sec. 6 refers to a "duty of Customs." Part II. is headed "Taxes," and refers to Land Tax, Income Tax, and Inhabited House Duties, a good instance of the accommodating meaning of the term as including some duties while excluding others. Part III. deals with Stamps. Part IV. with Excise. It is therefore evident that no invariable signification can be claimed for the word "tax," and not being unambiguous it is necessary for the purposes of construction to have regard to those circumstances to which I have already adverted. In approaching the construction of sec. 114 it must first be borne in mind that to constitutionally exempt a State from any obligation to pay Customs duty, leaving it free therefore at its own will to supply, not only its own sovereign needs, but also its own citizens, and through them the whole continent, with goods otherwise dutiable, might not merely weaken, but utterly frustrate the most cherished endeavours of the Federal Parliament to regulate the foreign trade and commerce of Australia, and seriously impair the revenues of other States. This would not merely leave to the several States the same power over the introduction of goods into Australia, which they had before Federation, but would vastly increase it, because the owners of goods never previously had the right which they now have of crossing State lines with their merchandise free of duty. This is a result certainly not to

be courted, and is in clear antagonism to the primary intention of the Constitution gathered from the grant of exclusive powers over foreign commerce, and over that class of taxation which is inseparable from its effectual regulation. It could scarcely have been the object of the framers of the Constitution to render it so easily and mortally vulnerable. If, therefore, another meaning, less destructive of the main purpose of the grants of power affected, and yet affording substantial protection to the States, can with proper regard for the language of the section be placed on the word "tax," that more limited meaning should, in my opinion, be given to it. Sec. 114, is, I believe, the only clause of the Constitution where the word "tax" is found. "Taxation," the generic term, is frequently employed and, as in sec. 55, includes Customs and Excise duties. But there are a great number of sections in which the particular class of taxation now under consideration is referred to, and constantly as "duties of Customs." Nowhere is that species of taxation called a "tax." Even in sec. 112 the same phraseology is retained. Then comes sec. 114, the structure of which is important. It forbids a State to raise forces except with Commonwealth consent, and then forbids it to "impose any tax on property of any kind belonging to the Commonwealth." Stopping there for a moment it is of course clear that, treating the provision necessarily as one of permanency, no Customs duty could be comprehended in the prohibition to tax Commonwealth property. The succeeding paragraph "nor shall the Commonwealth impose any tax on property of any kind belonging to a State" is a reciprocal inhibition relating to the same class of taxation. To make so serious an inroad into Commonwealth control of external commerce as the plaintiff's contention involves, would require the clearest expression of intention, and the mere use of a word not uncommonly employed in a limited sense, and indeed, in connection with the word "property" more often and more appropriately used in a limited sense, combined with the marked omission of the word "duties," convinces me that Customs duties are not within the object and intention of sec. 114.

Mr. *Pilcher* urged the view that if Customs duties were entirely outside the section, and completely within the control of the Federal Parliament, so must Excise duties be in all cases open to the Parliament to impose on the States. It is not necessary to determine this, but it may well be indicated that as the doctrine of State instrumentalities, as it is called, or in plainer English, the doctrine of the exercise of governmental functions, cannot be applied outside the territory of the State but only within that territory, its application, quite apart from sec. 114, may avert at least some of the consequences feared by learned counsel. Upon that subject I say nothing further.

For the reasons I have stated, my opinion is that the defendant ought to suceeed.

Higgins J.

The case for the State has been well put and forcibly, mainly on the grounds (1) that, according to the principles laid down by this Court in *D'Emden v. Pedder*[39] and in subsequent cases, the State agencies and functions are exempt from federal taxation; and[40] that by sec. 114 of the *Constitution* *the Commonwealth* is forbidden to tax the property of the State.

The first ground may be put into something like a syllogism:—The Commonwealth cannot tax a State Government function; *D'Emden v. Pedder*[41]; *Railway Traffic Employés Association Case*[42]; *South Carolina v. United States*[43]. The railways are a State Government function; *Railway Traffic Employés Association Case*[44]. Therefore, the Commonwealth cannot tax the railways.

These steel rails were the property of the New South Wales Government, and were being imported for the purposes of the New South Wales government railways.

As to this first ground, the argument for the plaintiff is wholly founded on certain doctrines adopted, and certain expressions used, by this Court in previous decisions. But for these doctrines and expressions I should not, personally, feel any difficulty with regard to the first ground. If it were open to me to do so, I confess I should like to reconsider the doctrine, or the limits of the doctrine, that there is to be implied from the Constitution any such prohibition of taxation as is asserted in *D'Emden v. Pedder*[45] and in the subsequent cases; and I should also like to reconsider the doctrine that the railways are a State governmental function—I mean, a strictly governmental function, in the same sense as the legislature, the executive and the judiciary are governmental functions. I am emboldened to express my doubt as to these doctrines because the Privy Council by its Judicial Committee has condemned the former doctrine. But I bow to the opinion of the majority of my learned colleagues, both as to these doctrines themselves, and as to the further doctrine that the Privy Council is in an appeal from the High Court "bound to accept and follow" the decision of the High Court with regard to a constitutional point of the nature referred to in sec. 74 of the *Constitution*: see *Baxter v. Commissioners of Taxation (N.S.W.)*[46]. My judgment in this case, therefore, must assume that these doctrines are, in their application hitherto, unimpeachable. But the doctrine as to the exemption of State agencies from Commonwealth taxation has never yet been applied to Customs taxation, taxation of the act of importation, as distinguished from internal taxation. It has never yet been applied so as to make an exception to the exclusive and paramount power of the Commonwealth Parliament to make laws with respect to trade and commerce with other countries, and with respect to Customs taxation (sec. 51 (I.) (II.); sec. 90).

For the reasons which I have stated in *The King v. Sutton*[47] I regard the doctrine as to the King not being bound save by express words, as being inapplicable as between the States and the Commonwealth, at all events in the exercise of an exclusive power of the Commonwealth; and I regard State laws and State powers in respect of the railways as subordinated to the Commonwealth powers with regard to trade and commerce, and with regard to Customs taxation.

But the interpretation of sec. 114 of the *Constitution* raises another difficulty. The section itself mixes up two distinct subjects. It forbids a State to raise a naval or military force without the consent of the Commonwealth Parliament; and it forbids a State to impose a tax on property of any kind belonging to the Commonwealth. Then, apparently, it occurred to the draughtsman that a similar prohibition should be inserted against the Commonwealth taxing State property. The prohibition as to State taxation was, no doubt, suggested by the *British North America Act*, sec. 125. But by substituting the word "property" for "lands or property," the intention—if it was the intention—to confine the prohibition to what are known as "property taxes" has been somewhat obscured. Property is, by the Constitution, subject to be taxed at the instance of the State as well as of the Commonwealth; Customs taxation is solely a matter for the Commonwealth (sec. 90). Taxes of retaliation, as between the States and the Commonwealth, are possible as to property taxes; but are impossible as to Customs taxes. But whatever may have been the motive which led to this express prohibition, in addition to the prohibition which this Court has held to be implied from the nature of the Constitution as to the taxation of State or Commonwealth agents, the phraseology is such as to point to taxation of property *as property* as being the subject of this express prohibition. "A State shall not, without the consent of the Parliament or the Commonwealth, ... impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State." But is a Customs tax a tax on property *as such*? The *Customs Tariff 1902* speaks of "duties ... on ... goods," and the expression is roughly accurate, although, probably, if fully expressed it would be a tax on persons in respect of the importation of goods; just as a property tax is usually, though not necessarily, a tax on persons in respect of their property. A Customs tax is a tax, not on property as such, but on persons in respect of the act of

importation. There is a fundamental difference between taxing men for having property, and taxing men for moving property—and, in particular, for moving property into the country from over seas. A turnpike toll, or an *octroi* tax, is not, properly speaking, taxation "imposed on property," although the person who moves the animals or goods through the gate or into the city has to make a payment based on the number or character or value of the things which enter. Unless they enter, there is no tax; if they enter, there is a tax—which has to be paid by the person who brings them in, whether he is the owner or not. In other words, it is not a "property tax." The case of succession taxes in the United States is analogous. Congress cannot, according to the doctrine of *M'Culloch v. Maryland*[48], tax State agencies; but it can tax a bequest of money or a devise of land to the State. It can tax the movement from the dead hand into the hand of the State: *Snyder v. Bettmann*[49]. Another analogy may be found in the distinction between taxation by a State of United States bonds, the property of a corporation, and taxation levied on the franchise or business of the corporation; although the amount of the tax may depend on the value of the bonds in each case: *Home Insurance Co. v. New York*[50].

Again, if the Commonwealth were to impose a property tax on Australian residents everywhere, based on the value of their property everywhere (for the present purpose I may assume—without deciding it—that such a tax would be valid), the tax would fall on them in respect of goods even in London. But when the Commonwealth imposes a Customs duty, the duty is not payable unless it be attempted to move the goods from London to Australia.

I prefer to base my judgment on this ground which I have stated. I cannot, confidently, take the ground that a Customs duty cannot be a tax within the meaning of the word "tax" in sec. 114. It is true that "duties of Customs" and "duties of Excise" are the usual expressions; but phraseology, such as is used in sec. 55, shows that the Constitution treats the imposing of such duties as being the imposing of taxes: "Laws imposing taxation, except laws imposing duties of Customs or of Excise, shall deal with one subject of taxation only." However, the fact that sec. 114 uses the mere word "tax"—not "tax of any kind," although it speaks of "property of any kind"—strengthens the view that the framers of the section could not have had Customs duties in their minds at the time. They lay the emphasis on the thought on ownership—"property of any kind belonging," &c.

I have based my reasoning on the words and the scheme of our own *Australian Constitution*. But it is a fact not to be ignored, that the plaintiff's counsel have not been able to point to any indication (to say the least) that in the United States or in Canada the separate States, or Provinces, are exempted from Customs taxation; although it is from the United States that this Court has adopted the doctrine as to the exemption of State agencies, and although the *Canadian Constitution* contains the section from which our sec. 114 is derived.

For the reasons which I have stated, I concur in the opinion that the States of Australia are liable to the payment of duties of Customs; that sec. 114 of the *Constitution* does not exempt them; that the duty was properly paid on the steel rails in question; and that judgment should be entered for the defendant with costs.

Questions answered accordingly.

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

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

[1] [1908] HCA 26; 5 C.L.R., 789.

[2] [1905] USSC 184; 199 U.S., 437.

[3] [1906] HCA 94; 4 C.L.R., 488, at p. 539.

[4] [1908] HCA 26; 5 C.L.R., 789.

[5] 3 App. Cas., 1090.

[6] [1896] USSC 184; 163 U.S., 625.

[7] [1896] USSC 184; 163 U.S., 625, at p. 629.

[8] 8 How., 490, 493.

[9] [1876] USSC 202; 94 U.S., 315.

[10] [1896] USSC 184; 163 U.S., 625, at p. 629.

[11] (1903) 3 S.R. (N.S.W.), 115.

[12] [1904] HCA 1; 1 C.L.R., 91.

[13] [1907] HCA 76; 4 C.L.R., 1087, at p. 1132.

[14] [1906] HCA 94; 4 C.L.R., 488.

[15] [1904] HCA 1; 1 C.L.R., 91.

[16] [1906] HCA 94; 4 C.L.R., 488.

[17] [1908] HCA 26; 5 C.L.R., 789.

[18] [1904] HCA 1; 1 C.L.R., 91, at p. 111.

[19] [1906] HCA 94; 4 C.L.R., 488

[20] [1905] USSC 184; 199 U.S., 437, at p. 448.

[21] [1827] USSC 36; 12 Wheat., 419.

[22] [1908] HCA 26; 5 C.L.R., 789.

[23] [1904] HCA 1; 1 C.L.R., 91.

[24] [1906] HCA 94; 4 C.L.R., 488.

[25] [1904] HCA 1; 1 C.L.R., 91, at p. 111.

[26] [1906] HCA 94; 4 C.L.R., 488, at p. 537.

[27] [1908] HCA 26; 5 C.L.R., 789.

[28] [1906] HCA 94; 4 C.L.R., 488.

[29] [1904] HCA 1; 1 C.L.R., 91, at p. 109.

[30] [1904] HCA 1; 1 C.L.R., 91.

[31] [1908] HCA 26; 5 C.L.R., 789.

[32] 2 St. Tri., 371.

[33] Vaugh., 159, at p. 163.

[34] Vaugh., 159, at p. 165.

[35] (1903) A.C., 478, at p. 481.

[36] [1827] USSC 36; 12 Wheat., 419.

[37] 24 How., 169, at p. 173.

[38] [1827] USSC 36; 12 Wheat., 419.

[39] [1904] HCA 1; 1 C.L.R., 91.

[40] 1 C.L.R., 488, at p. 537.

[41] [1904] HCA 1; 1 C.L.R., 91.

[42] [1906] HCA 94; 4 C.L.R., 488, at p. 537.

[43] [1905] USSC 184; 199 U.S., 437.

[44] [1906] HCA 94; 4 C.L.R., 488, at pp. 538-9.

[45] [1904] HCA 1; 1 C.L.R., 91.

[46] [1907] HCA 76; 4 C.L.R., 1087, at pp. 1100, 1116.

[47] [1908] HCA 26; 5 C.L.R., 789.

[48] 4 Wheat., 316.

[49] [1903] USSC 167; 190 U.S., 249.

[50] [1886] USSC 217; 119 U.S., 129.

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