Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of ***Webb*** v. *Outtrim* (*Respondent*) *and The Commonwealth of Australia* (*Intervenant*), *from the Supreme Court of Victoria; delivered the 6th December* 1906.

Present at the Hearing:

THE EARL OF HALSBURY.
LORD MACNAGHTEN.
SIR ARTHUR WILSON.
SIR ALFRED WILLS.

[*Delivered by The Earl of Halsbury.*]

This is an Appeal from an Order of the Supreme Court of Victoria in the Commonwealth of Australia, in which the substantial question is whether the Respondent, an officer of the Commonwealth, is liable to be assessed for income tax imposed by an Act of the Victorian Legislature in respect of his official salary, he being resident in Victoria and his salary being received by him in that State. By the Victoria Act 18 & 19 Vict. chap. 55, it was enacted that there should be established in Victoria, instead of the Legislative Council then subsisting, one Legislative Council and one Legislative Assembly constituted as therein provided, and it was therein further enacted that Her Majesty should have power by and with the advice and consent of the Council and Assembly in question to make laws in and for Victoria in all cases whatsoever. And in the Commonwealth of Australia Constitution Act (63 & 64 Vict. chap. 12) it is further provided (Section 106) that—

"The Constitution of each State of the Commonwealth "shall subject to this Constitution continue as at the "establishment of the Commonwealth . . . until altered "in accordance with the Constitution of the State."

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Section 107 provides—

"Every power of the Parliament of a Colony which has "become or becomes a State shall, unless it is by this Constitu- "tion exclusively vested in the Parliament of the Common- "wealth or withdrawn from the Parliament of the State, "continue as at the establishment of the Commonwealth . . ."

No question arises either as to the general authority of the State of Victoria to impose taxation upon all who are within the ambit of its authority, nor do their Lordships understand that any question arises as to the legality of the tax in question other than the one question which has been argued before them. That question is, whether the power given in such wide words as have been mentioned above has been curtailed and so far restricted that, if a person be an officer of the Commonwealth, though he may be resident in Victoria and may have received his salary therein, he is not taxable in respect of such salary. It is not contended that this restriction on the powers of the Victoria Constitution is enacted by any express provision of the Commonwealth Act, but it is argued that, inasmuch as the imposition of an income tax might interfere with the free exercise of the legislative or executive power of the Commonwealth, such interference must be impliedly forbidden by the Constitution of the Commonwealth, although no such express prohibition can be found therein. The main reliance in favour of this argument is placed upon a Judgment delivered by Chief Justice Marshall on an occasion when a similar question arose between the Federal authorities and one of the States of the American Union, *McCulloch* v. *State of Maryland* (4 Wheat. 316). No one would speak lightly of the authority of such a Judge as Chief Justice Marshall, and, dealing with the same subject-matter as that to which that most learned and logical lawyer applied his observations, his judgment might well be accepted as conclusive. But, as Chief Justice Griffith

himself points out, "we are not . . . bound "by the decisions of the Supreme Court of the "United States," though, as the same learned Judge says further on in the same case (*D'Emden* v. *Pedder*, 1 Commonwealth L.R. 91, at p. 112), those decisions may be regarded as "a most welcome aid and assistance" in any analogous case. But here the analogy fails in the very matter which is under debate. No State of the Australian Commonwealth has the power of independent legislation possessed by the States of the American Union. Every Act of the Victorian Council and Assembly requires the assent of the Crown, but when it is assented to, it becomes an Act of Parliament as much as any Imperial Act though the elements by which it is authorized are different. If indeed it were repugnant to the provisions of any Act of Parliament extending to the Colony it might be inoperative to the extent of its repugnancy (*see* The Colonial Laws Validity Act, 1865), but, with this exception, no authority exists by which its validity can be questioned or impeached. The American Union, on the other hand, has erected a tribunal which possesses jurisdiction to annul a statute upon the ground that it is unconstitutional. But in the British Constitution, though sometimes the phrase "unconstitutional" is used to describe a statute which, though within the legal power of the Legislature to enact, is contrary to the tone and spirit of our institutions, and to condemn the statesmanship which has advised the enactment of such a law, still, notwithstanding such condemnation, the statute in question is the law and must be obeyed. It is obvious that there is no such analogy between the two systems of jurisprudence as the learned Chief Justice suggests. The enactments to which attention has been directed do not seem

to leave any room for implied prohibition. *Expressum facit cessare tacitum.* And the language of the Commonwealth Act indicates with sufficient clearness that its framers had not overlooked, as indeed it would be impossible to suppose they could have overlooked, the Constitution of each State of the new Commonwealth as declared and enacted by the statutes under which they were created. It is quite true, as observed by Chief Justice Griffith, in the above-mentioned case of *D'Emden* v. *Pedder* (1 Commonwealth L. R. 91, at p. 110), that—

"When a particular form of legislative enactment, which "has received authoritative interpretation, whether by judicial "decision or by a long course of practice, is adopted in the "framing of a later Statute, it is a sound rule of construction "to hold that the words so adopted were intended by the "Legislature to bear the meaning which has been so put upon "them."

But it is an extraordinary extension of such a principle to argue that a similarity, not of words, but of institutions, must necessarily carry with it as a consequence an identity in all respects. It is to be observed that the principle is variously stated by the learned Judge in two of the cases to which their Lordships were referred as containing the reasons for the Judgment under Appeal. In *D'Emden* v. *Pedder* (1 Commonwealth L.R. 91, at p. 113), the learned Chief Justice says :—

"We cannot disregard the fact that the Constitution of the "Commonwealth was framed by a convention of represen- "tatives from the several colonies. We think that, sitting "here, we are entitled to assume—what after all is a fact "of public notoriety—that some, if not all, of the framers of "that Constitution were familiar, not only with the Constitu- "tion of the United States but with that of the Canadian "Dominion and those of the British Colonies. When, there- "fore, under these circumstances, we find embodied in the "Constitution provisions undistinguishable in substance, though "varied in form, from the provisions of the Constitution of the "United States which had long since been judicially inter- "preted by the Supreme Court of that Republic, it is not an "unreasonable inference that its framers intended that like "provisions should receive like interpretation."

The first observation that arises upon this argument is that the Chief Justice does not state what are the provisions "undistinguishable "in substance though varied in form." And it is extremely difficult to understand the application of the principle involved unless the comparison is made clear by the juxtaposition of the provisions. The same learned Judge, in *Deakin* v. *Webb* and *Lyne* v. *Webb* (1 Commonwealth L. R. 585, at p. 606), says, as justifying his rejection of the relevancy of the distinction between the Governments of the United States and the Constitution of the English Monarchy,—

> "It is a matter of common knowledge that the framers "of the Australian Constitution were familiar with the "two great examples of English-speaking Federations, and "deliberately adopted with regard to the distribution of powers "the model of the United States in preference to that of the "Canadian Dominion."

Again, it is somewhat difficult to know what it is to which the learned Judge refers, and the only explanation he gives is that "they used "language not verbally identical but synony-"mous for the purpose of defining that distribu-"tion." It is, indeed, an expansion of the canon of interpretation in question to consider the knowledge of those who framed the Constitution and their supposed preferences for this or that model which might have been in their minds. Their Lordships are not able to acquiesce in any such principle of interpretation. The Legislature must have had in their minds the constitution of the several States with respect to which the Act of Parliament which their Lordships are called upon to interpret was passed. The 114th Section of the Constitution Act sufficiently shows that protection from interference on the part of the Federal power was not lost sight of. It is impossible to suppose that the question now in debate was left to be decided upon an implied prohibition

when the power to enact laws upon any subject whatsoever was before the Legislature. For these reasons their Lordships are not able to acquiesce in the reasoning of the High Court Judgments governing the Judgment under Appeal. They will therefore humbly advise His Majesty that the Judgment of the Supreme Court of Victoria ought to be reversed, that it ought to be declared that the salary in question was rightly included in the State assessment and was liable to income tax, and that each party ought to pay his own costs of the special case and in the Supreme Court.

With respect to the objection urged—both as a preliminary objection and one of substance—to the hearing of the Appeal at all by this Board, their Lordships are disposed to adopt the reasoning of the Supreme Court in giving leave to appeal. The only basis upon which the objection can be suggested to be founded is the Commonwealth Act, and no direct authority under that Act has been shown. If, as Mr. Justice Hodges says, there is no direct authority, it is not reasonable to suppose that the British Parliament ever intended so important an end to be attained by indirect or circuitous methods. "In such an important "matter direct authority would be given, or "none at all, and none is directly given." The learned Judge continues—

"I may further observe that the appeal to the King in "Council was, as a matter of history, one of the matters that "was prominently before the British Legislature at the time it "passed the Commonwealth Constitution Act, and the extent "to which a citizen's chance of getting a hearing from that "august tribunal is affected is shown in Sections 73 and 74. "Neither of these Sections authorises the Commonwealth "Parliament to take away the right in such a case as the one "I am now considering, nor does any other Section directly "give such authority. And I think I might content myself by "saying those two Sections deal with this subject and do not "authorise the Commonwealth Parliament to deprive the "subject of this right of Appeal against a judgment of the "State Court, and no other Section gives such authority."

Their Lordships also concur in what the same learned Judge says at the end of his Judgment:—

"If the Federal Legislature had passed an Act which said "that hereafter there shall be no right of appeal to the King "in Council from a decision of the Supreme Court of Victoria "in any of the following matters, and had then set out a "number of matters, including that now under consideration, "I should have felt no doubt that such an Act was outside "the power of that Federal Legislature. And, in my opinion, "it is outside their power to do that very thing in a "roundabout way."

Their Lordships will therefore humbly advise His Majesty that the Petition presented by the Commonwealth of Australia for a dismissal of the Appeal on the ground of its incompetency, ought to be dismissed.

There will be no order as to the costs of the Appeal as between the Appellant and the Respondent. The Commonwealth must pay the Appellant's costs of the Intervention.