Sydney Municipal Council v Commonwealth [1904] HCA 50; (1904) 1 CLR 208 (26 April 1904)

HIGH COURT OF AUSTRALIA

H C of A

26 April 1904

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

Wise K.C., Attorney-General for New South Wales (Want K.C., and Edmunds with him), for plaintiffs.

Drake A.G. for the Commonwealth (Dr. Cullen and J. J. Cohen with him), for the defendant.

Dr. Cullen followed.

Wise, K.C., in reply.

26th April

Griffith, C.J.

In this action the Municipal Council of Sydney claims to recover from the Commonwealth municipal rates in respect of land situate within the City of Sydney, and occupied by the defendants for the purposes of the Departments of Customs, Posts and Telegraphs, and Defence, the land having become vested in the defendants by virtue of sec. 85 (1) of the *Constitution* upon the transfer of those departments to the Commonwealth. The defendants claim that the rates in question, which were made since the date of transfer, are within the prohibition of sec. 114, which provides that "a State shall not without the consent of the Parliament of the Commonwealth ... impose any tax on property of any kind belonging to the Commonwealth." For the plaintiffs it is contended, first, that a municipal rate is not a tax within the meaning of sec. 114, and, secondly, that, if it is, the provisions of the *Sydney Corporation Act 1879*, by which (sec. 103, re-enacted as sec. 110 of the *Sydney Corporation Act 1902*) (1902 No. 35) Crown lands were expressly declared to be liable to rates, were continued in force by sec. 108 of the *Constitution* until the Parliament of the Commonwealth should think fit to legislate in a contrary sense, when, it is said, the provisions of sec. 109 of the *Constitution* would come into operation, and the State law, being inconsistent with the Federal law, would cease to have effect. No such Federal law has yet been passed. A subsidiary contention was that, in determining whether the rate, assuming it to be a tax within the meaning of sec. 114, was valid or not, regard should be had to the date of the passing of the New South Wales Statute, and not to the dates when the particular rates in question were made, and that, therefore, the rates for 1901 and 1902, made under the Act of 1879, which was passed before the establishment of the

Commonwealth, were valid, even if those made under the Act of 1902 were invalid, which, however, was not conceded. There can be no doubt that the right of taxation is a right of sovereignty. It may be exercised upon all persons, and in respect of all property, within the jurisdiction of the sovereign power which exercises it. Municipal taxation springs from this sovereign right, and is an exercise of it by delegation to the municipality. No other origin for it can be suggested. It follows that if the authority which assumes to create such a delegation does not itself possess the power, the delegation is void, since the spring cannot rise higher than its source. A municipal corporation, therefore, cannot have any greater power to impose taxation than the State by which it is created, and by which its own powers are conferred. It is true that the word "tax" is sometimes used in the limited sense of an enforced levy for the purposes of the general government, but, if a State itself has no power to make such a levy, it cannot confer the power under another name. In a constitutional instrument, therefore, defining and limiting the power of constitutional authorities, the word "tax" must be construed in the wider sense, and a prohibition of the imposition of a tax must be held to include a prohibition of any such imposition by a delegated authority, by whatever name the tax is called. The *Sydney Corporation Act* does not, of itself, purport to impose rates, but merely requires the Municipal Council to make an annual assessment of the values of land within the municipality, and to make an annual rate of such amount as they think proper, within prescribed limits. The grant of the power, which is the act of the State, and the exercise of the power, which is the act of the corporation, are essentially different. The Statute operates as a delegation of the taxing power of the State, coupled with a direction when and how to use it. The assessment of land and the striking of a rate together operate as municipal legislation in exercise of the power. It is clear, therefore, that under this Act the imposition of a rate is the act of the corporation, and not of the State, and that the tax is imposed from time to time when the rate for the year is made. It follows that the prohibition of sec. 114, if applicable, applies to the rate for every year in which it is sought to levy it.

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 change in constitutional ownership is accurately and unmistakeably denoted by the language of sec. 85 in which it is expressed.

The term "the Crown" as used in the *Sydney Corporation Act* must be taken to mean the Crown in its capacity as representing the State of New South Wales. In the Act of 1879, passed before the establishment of the Commonwealth, it obviously had that meaning, and no wider one can be given to it in the re-enactment of 1902. The argument, therefore, sought to be founded upon the assent of the Crown, given through the Governor of New South Wales, to the taxation of Crown lands, fails, since land vested in the Commonwealth or in the Crown in right of the Commonwealth is not Crown land within the meaning of the Sydney Act. Nor, in my judgment, can the liability of the land, while Crown land of New South Wales, to municipal taxation be regarded as a liability running with the land, any more than if the land had afterwards been granted for a purpose which would exempt it from such liability.

It was pointed out in the argument that under the Sydney Act the municipal rates are not, as in some municipal Acts, such as that which we had to consider in *Borough of Glebe v. Lukey* (*ante*, p. 158), made a charge upon the land, but are a personal liability of the owner or occupier, and may be levied by distress upon the chattels found upon the land. But this distinction does not affect the substantial character of the imposition, which is a tax in respect of property. All such taxes primarily impose a personal liability upon individuals, and it is, in my opinion, immaterial whether the land does or does not itself become subject to a charge in the nature of an encumbrance. In either case the tax is in substance a "tax on property" in the sense in which these words are commonly understood, and certainly in the sense in which they are used in sec. 114 of the *Constitution*.

With regard to the argument founded on sec. 108, it is to be remarked that the section by its express terms applies only to laws of a State "which relate to matters within the powers of the Parliament of the Commonwealth." These matters are, in my opinion, those enumerated in secs. 51 and 53. The law in question is one relating to the imposition of municipal taxation under the authority of the State. I am quite unable to see how such a matter can, in any sense, be regarded as one within the powers of the Parliament of the Commonwealth. It is true that one of the powers of that Parliament is to make laws with respect to taxation. But the taxation referred to is federal taxation for federal purposes. It was, however, suggested that, as the State may with the consent of the Commonwealth Parliament impose taxes on the property of the Commonwealth (sec. 114), their consent may be regarded as a matter "within the powers of the Parliament," seeing that it may be either given or withheld. In my judgment, however, the consent intended by sec. 114 is a consent expressed by some positive action on the part of the Parliament, not one to be tacitly inferred from its inaction. Parliament, which is a legislative body, ordinarily expresses its will by a legislative Act, and there is nothing in the section itself to suggest that the prohibition, which is direct and explicit, can be withdrawn in any other way. While, however, the consent required to validate State taxation, as such, of Commonwealth property must be given by Statute, the same practical result, in a pecuniary sense, might, no doubt, be effected by the appropriation of money to an amount equal to the rates which would be imposed on the same property if it were liable to taxation.

The Act of 1879 continued therefore in force "subject to the Constitution," that is to say subject to the prohibition of sec. 114, and the Act of 1902 is subject to the same prohibition.

If the tax is considered as merely a tax upon the Commonwealth regarded as a juristic person, or upon its officers as persons?a view which for reasons already given I think erroneous?other considerations would arise. In that view, the question for discussion would be whether a State, or a delegated authority within a State, has power to affect the Commonwealth or its officers in the performance of the duties cast upon them by the Constitution or by the laws of the Commonwealth. The answer to this question depends upon the further question whether, under the Constitution of the Commonwealth, the jurisdiction of the States extends to the Commonwealth regarded as a juristic person, or to its officers in the performance of their duties as such officers. On this point my opinion is sufficiently expressed in the judgment in the case of *D'Emden v. Pedder* (*ante*, p. 91.)

For these reasons I am of opinion that the rates sought to be recovered in this action are taxes within the meaning of sec. 114 of the *Constitution*, that they are taxes imposed upon property, and that the imposition of them upon property of the Commonwealth is prohibited by the express words of sec. 114 of the *Constitution*. I am of opinion further, for the reasons given in that case, that sec. 110 of the *Sydney Act of 1902* should be construed as not applying to the lands in question.

Judgment must therefore be given for the defendants.

Barton, J.

I have had the advantage of reading the opinion just delivered by the *Chief Justice*, and I strongly concur in it. I desire, however, to add a few observations.

In the case of *Wisconsin Central Railroad Co. v. Price County*, 133 U.S.R., 496, reported in 1889, the opinion of the Supreme Court of the United States, delivered by *Field*, J., opened with the following passage:?"It is familiar law that a State has no power to tax the property of the United States within its limits. This exemption of their property from State taxation?and by State taxation we mean *any taxation by authority of the State, whether it be strictly for State purposes or for mere local and special objects*?is founded upon that principle which inheres in every independent government, that it must be free from any such interference of another government as may tend to destroy its powers or impair their efficiency. If the property of the United States could be subjected to taxation by the State, the object and extent of the taxation would be subject to the State's

discretion. It might extend to buildings and other property essential to the discharge of the ordinary business of the national government, and in the enforcement of the tax those buildings might be taken from the possession and use of the United States. The Constitution vests in Congress the power to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." And this implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise."

This exemption from State taxation is essential to the preservation of the powers granted to the United States by the Constitution, and it would exist even were it not buttressed by the provision quoted by *Field*, J. A similar exemption is essential in the case of the Commonwealth, and the Australian Constitution contains provisions which are by way of security analogous to, and by way of express exclusion, even stronger than, those of the 3rd section of Article IV. of that of the United States. See *Commonwealth Constitution*, sec. 53 (i.) and (ii.) But in order that this particular matter may not be allowed to rest merely on a clear principle of construction, our own Constitution goes on to provide in its 114th section that "a State shall not, without the consent of the Parliament of the Commonwealth ... impose any tax on property of any kind belonging to the Commonwealth," while the Commonwealth is in its turn forbidden to tax property of any kind belonging to a State.

It is argued, however, that a general rate imposed under the *Sydney Corporation Act of 1879*, consolidated in the Act of 1902, is not a tax within the meaning of sec. 114. That contention has been fully disposed of by the *Chief Justice*. It is further contended that the State Act is protected by sec. 108 of the *Constitution*. As a municipal rates Act does not "relate to any matter within the powers of the Parliament of the Commonwealth," sec. 108 can hardly apply. But, independently of sec. 108, the State Act is valid and uninterfered with by the Constitution in respect of all the subject-matter to which it can properly apply. Is this property part of the subject-matter? When lands are by the operation of the Constitution taken from a State and vested in the Commonwealth they are, with the department which uses them, transferred from State to Commonwealth, from the one government to the other. They may still be called lands of the Crown, but the sense in which they are Crown lands is not the same. If this were otherwise, it would have been absurd to provide, as the Constitution does in sec. 85 (iii.), that "the Commonwealth shall compensate the State for the value of any property passing to it under this section," and that "if no agreement can be made as to the mode of compensation, it shall be determined under laws to be made by the Parliament." One can understand the Commonwealth compensating the State, or agreeing with it as to the mode of compensation. But compensation made by the Crown to the Crown, or an agreement made by the Crown with itself, is in either case an operation which baffles comprehension. Similarly if the argument for the plaintiff corporation were followed, sec. 85 (iv.) would become meaningless, for how can the Crown relieve the Crown by assuming its own current obligations? And many other provisions of the Constitution would in like manner lose all sense and meaning. I am of opinion, therefore, that, upon the properties in question becoming vested in the Commonwealth, they ceased to be part of the subject-matter of the *Corporation Act*, and so ceased to be rateable under that Act as lands of the Crown, and that the Act did not and could not subject them as lands of the Commonwealth to the liability which it could and did place upon them when they were lands of the State.

But the argument on the part of the plaintiffs goes to the length that the *Corporation Act of 1879* operated on those properties because it was passed in the exercise of a power which existed before Federation, and was preserved by sec. 107, and that the *Consolidation Act of 1902*, similarly operates as a renewed exercise of the same power. Now as no power to tax property of the Commonwealth existed before Federation, it is hard to see how any such power "continues" within the meaning of sec. 107, which was framed for the purpose of ensuring that certain powers should be kept alive, not for the purpose of creating new ones. So that I do not see how sec. 107 helps the plaintiff corporation. Indeed I fail to perceive how any of the arguments as to the "continuance" of powers and of laws under secs. 107 and 108 can avail to establish the claim for these rates, for I agree in thinking that it is not the *Corporation Act* itself which imposes the rate, *i.e.*, the tax. The Act gives power to impose it, and directs an annual assessment and rate. It is not until a property has been included in an assessment, and a rate has been struck, that the rate can be held to be imposed on that

property. The assessments and rates, *i.e.*, taxes, with which the Court is now concerned, relate to periods following the 1st January, 1901, when the people of these States became united in a Federation. The taxes, therefore, which are claimed in this case, were "imposed" after Federation, and even if we concede the plaintiff's contention that sec. 114 was intended to prohibit only that taxation which at the date of Federation was in the future, these taxes come within the express prohibition, and are quite unentitled to any protection under sec. 107 or sec. 108, while it seems to me, for the reason given by the *Chief Justice*, that the condition of obtaining the consent of the Parliament of the Commonwealth has in no way been performed. Holding the view that the "imposition" of taxation with which we are at present concerned has taken place since Federation, I consider also that, apart from the express prohibition of sec. 114, the arguments of *Marshall*, C.J., in *McCulloch v. Maryland*, could if necessary be urged with much force in this case. At any rate, I venture for myself to adopt the statement and the reason of *Field*, J., in the passage cited at the outset of my opinion. I wish to avoid any implication which might be drawn from my silence that I agree with Mr. Wise's argument that the maxim "*expressio unius est exclusio alterius*" can be so applied to sec. 114 as to defeat the operation of what are called the implied powers of the federation. Such admission would be disastrous to the very existence of this Commonwealth, and is the last intention of all to be imputed to its framers. Most of its expressed power would at once become subject to swift destruction or gradual attrition within the several States in proportion to the extent to which a judicial license to invade the sphere of the general government might be acted on, with motives however laudable, under cover of State legislation. In my view the prohibition in sec. 114 was for greater emphasis and for unmistakeable clearness, and was in no sense inserted for the purpose of stifling the reasonable and obvious inference that the grants of power to the general government carried with them every right necessary to their preservation and defence?rights not to be mistaken for any authority to usurp or destroy.

Here I am led, before concluding, to refer to a suggestion which came from the Attorney-General for New South Wales in the course of his able argument. He rather disputed the applicability, in point of reason, to our circumstances, of some of the opinions of American jurists on questions of the interpretation of constitutional enactments. He pointed out that in some judgments reference was made to the possible consequences of decisions which would give license to invasions of the sphere of the Federal Government, the consequences of which might amount to the dissolution of the American Union. He inferred that the judgments of the time were given in fear that contrary decisions might bring about that result, with its dreaded attendant, in the shape of civil war. Attentive perusal of these great deliverances will dispel the notion that consequences which were pointed out as possible, were the impelling reasons of their utterance. In discussing questions of the relative powers of the Union and the State, the exposition of their Constitution by American jurists, whether in their judgments or their commentaries, has always been founded on those principles of construction which have been equally adopted as guides by British lawyers. This truth cannot be better stated than as Professor Dicey puts it in the introduction of his *Law of the Constitution*, 5th ed., at p. 5: "The American lawyer has to ascertain the meaning of the Articles of the Constitution in the same way in which he tries to elicit the meaning of any other enactment. He must be guided by the rules of grammar, by his knowledge of the common law, by the light (occasionally) thrown on American legislation by American history, and the conclusions to be derived from a careful study of judicial decisions. The task, in short, which lay before the great American commentators, was *the explanation of a definite legal document in accordance with the received canons of legal interpretation*. Their work, difficult as it might prove, was work of the kind to which lawyers are accustomed, and could be achieved by the use of ordinary legal methods." None of us will dispute the weight of these words. Justly applied as they are to the work of a Story or a Kent, they are no less striking in their application to the even greater labours of a Marshall.

I agree that the judgment on this special case must be for the Commonwealth, and with costs.

O'Connor, J.

The judgments delivered, in which I entirely concur, have dealt so fully with the various contentions raised in the argument that I do not think it necessary to add anything except in reference to sec. 114 of the *Constitution*, upon the true interpretation of which the whole case in my opinion turns. The question for our determination may be very shortly stated.

Upon the establishment of the Commonwealth the Customs Houses in New South Wales as in other States became vested in the Commonwealth. Subsequently the Posts and Telegraph Department and the Department of Defence became transferred by proclamation under sec. 69 of the *Constitution*, and thereupon the lands and buildings used in connection with these departments became vested in the Commonwealth under sec. 85 of the *Constitution*.

Before the establishment of the Commonwealth such of these lands and buildings as were within the boundaries of the City of Sydney were liable to be rated, and were rated by the Municipal Council of Sydney under sec. 103 of the *Sydney Corporation Act of 1879*, and sec. 110 of the *Sydney Corporation Act of 1902*, which repealed that Act and took its place.

It was contended by the plaintiffs that, notwithstanding the establishment of the Commonwealth, and the vesting of these lands and buildings in the Commonwealth, the liability to be rated and to pay rates to the Municipal Council continued as before. The defendant on the other hand contended that, when the lands and buildings were vested in the Commonwealth, the liability to be rated by the Sydney Municipal Council came to an end. The question now submitted for our determination is, which contention is correct?

The defendants' case rests mainly upon sec. 114 of the *Constitution*, which they ask the Court to interpret broadly as a direct prohibition against the levying of any tax or rate upon Commonwealth property by a State, or by any authority constituted or authorized by the Statutes of a State. The plaintiff, on the other hand, urges that a much more restricted interpretation should be placed upon the section, that the prohibition is only against any action of the State itself or the Parliament of the State, in imposing taxation for the purposes of Government. The section may in strictness bear either interpretation, if we look merely at the words. But to get at the real meaning we must go beyond that, we must examine the context, consider the Constitution as a whole, and its underlying principles and any circumstances which may throw light upon the object which the Convention had in view, when they embodied it in the Constitution. This is a sound rule in the interpretation of Statutes, and is well explained by *Lord Blackburn* in the *River Wear Commissioners v. Adamson*, 2 App. Cas., at p. 763, as follows:?"In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring further and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they are used." Before examining the words of the section, it will be useful to advert to the circumstances which the Convention had in view in framing this section, and their purpose and object in relation to those circumstances.

From the very nature of the Constitution, and the relation of States and Commonwealth, in the distribution of powers, it became necessary to provide that the sovereignty of each within its sphere should be absolute, and that no conflict of authority within the same sphere should be possible. The principles laid down by *Marshall*, C.J., in his historic judgment in *McCulloch v. Maryland* (4 Wheat., (U.S.), p. 316), are as applicable to the Australian Commonwealth Constitution as to the United States Constitution, and it must be taken that those principles and the controversies which had arisen in the United States in reference to their application, were within the knowledge of the Convention. In laying down these principles the Courts of the United States, in the absence of express provision, rested their reasoning upon the underlying principles of the Constitution, and on what was necessarily involved in the grant of sovereign powers. What could be more natural than that the Convention should, while it had the opportunity place the application of these principles to

the property of the Commonwealth, at all events, as far as possible, beyond controversy by embodying them directly in the face of the Constitution.

The material words of the section are as follows:?"A State shall not without the consent of the Parliament of the Commonwealth ... impose any tax on property of any kind belonging to the Commonwealth..."

It has been urged that, because the prohibition is against a State, and the word "tax" only is used, the section cannot apply to a rate levied by a municipality. The section would, indeed, fall short of its object if it prohibited only taxation directly imposed by a State Act of Parliament, and left Commonwealth property open to taxation by a municipality or any other agency which the State Parliament might choose to invest with powers of taxation. But no such restricted interpretation is necessary or reasonable. The State, being the repository of the whole executive and legislative powers of the community, may create subordinate bodies, such as municipalities, hand over to them the care of local interest, and give them such powers of raising money by rates or taxes as may be necessary for the proper care of these interests. But in all such cases these powers are exercised by the subordinate body as agent of the power that created it. *Field*, J., in his judgment in *Meriwether v. Garrett*, 102, U.S.R., at p. 511, says:?"Municipal corporations are mere instrumentalities of the State for the more convenient administration of local government. Their powers are such as the legislature may confer, and these may be enlarged, abridged, or entirely withdrawn, at its pleasure. This is common learning found in all adjudications on the subject of municipal bodies, and repeated by text writers."

The prohibition against the State imposing taxation on Commonwealth property is the most comprehensive form of prohibition that can be used, and, if we are to have regard to the circumstances within the knowledge of the Convention, and the evident object and purpose of the section to which I have referred, it must be taken that the prohibition extends not only to taxation by a State for the purposes of general government, but also to taxation by an agency under the authority of the State, and deriving its power to levy taxation from the Parliament of the State. To hold otherwise would be to declare that the State might do indirectly what it cannot do directly. It seems to be clear, therefore, that a State has no more right to give legislative authority to a municipality to impose the tax, than it has to impose the tax itself, and that any provision in a State Act purporting to give such authority would be null and void. But it is urged on the part of the plaintiff that the section is prospective in its operation, and that it does nothing more than prohibit the passing of legislation by the State authorizing either State authority or municipal authority to levy the tax, and that a portion of the rates claimed were levied under the *Sydney Corporation Act of 1879*, a Statute which was in operation at the establishment of the Commonwealth, and which, it is contended, is kept alive by the operation of sec. 108 of the *Constitution*.

It is true that the section has only a prospective application, that is to say, it prohibits the imposing of any tax after the establishment of the Commonwealth, but I cannot assent to the restricted interpretation which it is sought to place on the word "impose." "Impose," no doubt, includes the giving of legislative authority to levy the tax, but it includes more, it includes the executive act of levying or collecting the tax. Its dictionary meaning is "to levy or exact as by authority." Having regard to the scope and purport of the section, effect must be given to that plain grammatical meaning of the word. It is unnecessary for me, in this aspect of the case, to consider whether the Act under which the tax is sought to be levied has, or has not, been kept alive by sec. 108. Existing Statutes are mentioned under that section, subject to the Constitution, and, in my view, sec. 114 expressly prohibits the imposing, that is to say, levying, exacting or collecting of the tax after the establishment of the Commonwealth. The section can be made fully effective, having regard to its scope and purpose, as already explained, only by giving a broad and reasonable interpretation to its language, including in the expression "State," all the agencies and instrumentalities by which a State can exercise its power of taxation, including in the word "impose" both meanings already alluded to, according as the thing to be prohibited is the legislative authority or the administrative Act, and

giving to the word "tax" its ordinary grammatical meaning, which is wide enough to cover the general rates of a municipality. So interpreting the section, I am of opinion that the Constitution prohibits the levying of these rates, and that the Commonwealth is not liable in respect of the claim of the Municipal Council of Sydney.

Judgment for defendants.

Certificate refused.

Solicitors, for the plaintiffs, Waldron, Dawson & Glover.

Solicitors, for the defendant, The Crown Solicitor.
