

# HIGH COURT OF AUSTRALIA

Burton

Vs.

Honan

(Dixon C.J.(1), McTiernan(2), Webb(3) and Kitto(4) JJ.)

23 June 1952

## CATCHWORDS

Constitutional Law (Cth.) - Customs - Statute - Validity - Forfeiture of goods - Seizure - Condemnation - The [Constitution](#) (63 & 64 Vict. c. 12), [s. 51](#) (i.), (ii.), (xxxi.), (xxxix.) - Customs Act 1901-1950, (No. 6 of 1901 - No. 56 of 1950), ss. 203, 229, 262.

Customs - Forfeiture - Seizure of goods in hands of bona-fide purchaser for value - Customs Act 1901-1950 (No. 6 of 1901 - No. 56 of 1950).

## HEARING

Brisbane, 1952, June 23. 23:6:1952 REFERENCE under s. 18 of Judiciary Act 1903-1950.

## DECISION

### DIXON C.J.

1. This matter is a reference from a judge sitting in the original jurisdiction dealing with a matter coming before him in consequence of ss. 38A and 40A of the Judiciary Act 1903-1950. (at p174)
2. The matter came before his Honour, Mr. Justice McTiernan, who, having heard some argument, made an order that it be referred to the Full Court to consider all inter se questions arising upon the evidence adduced at the hearing of the case before the Supreme Court. The proceeding is an action instituted in the Supreme Court in the ordinary way by writ of summons. The action was by the purchaser of a motor car against the vendor and the cause of action was based on The [Sale of Goods Act](#) of 1896 (Q.). The provision of The [Sale of Goods Act](#) upon which the cause of action arose was the familiar one which entitles the buyer of goods to an implied warranty that he shall have and enjoy quiet possession of the goods he takes under the sale. The motor car was seized in the hands of the purchaser by the Customs as goods forfeited to the Crown pursuant to s. 229 of the Customs Act 1901-1950. The car was an American automobile which was imported in 1950. It was actually landed on or about 24th April 1950, by one Doyle. It would appear that Doyle had not at that time a licence for the importation of the goods and under the Customs (Import Licensing) Regulations such a licence was necessary. He did, however, obtain one, and the goods after entry for home consumption, pursuant to the licence, were delivered out of the control of the Customs. It would seem that in obtaining the licence he made a representation which subsequently the Customs

authorities came to regard as untrue. At all events, he was prosecuted under three informations upon which he was convicted. (at p175)

3. The first conviction was for that on 2nd May 1950, he, Doyle, did mislead an officer in a particular likely to affect the discharge of his duty, in that in relation to an application for a licence, pursuant to the Customs (Import Licensing) Regulations, he did represent to such officer that a certain Buick 1949 second-hand car was a bona-fide gift to him from a certain person, whereas the fact was that the motor car was not a bona-fide gift to him from that person. (at p175)

4. The second information was for that he did make on the same date in a document produced to an officer, to wit an application for a licence pursuant to the Customs (Import Licensing) Regulations, a statement which was untrue in a particular, in that he did state therein that the same car was a gift from a consignor, whereas it was not. Lastly, the third information was for that he did import the car when it was a prohibited import. (at p175)

5. Section 229 (b) of the Act says that the following goods shall be forfeited to the Crown - all goods imported which are prohibited imports - subject to certain exceptions. Section 229 (i) says that all goods in respect of which any entry, invoice, declaration, answer, statement or report which is false in any particular has been delivered, made or produced are forfeited to the Crown. (at p175)

6. On the basis of that conviction, so far as Doyle was concerned, the car was then to be regarded as a prohibited import forfeited to the Crown. (at p176)

7. But s. 262 of the Act provides that where the committal of any offence causes a forfeiture of any goods the conviction of any person for such an offence shall have effect as a condemnation of the goods in respect of which the offence is committed. (at p176)

8. The convictions, therefore, would have under that provision, the effect of condemning the goods, the car, as goods in respect of which an offence had been committed. (at p176)

9. Now the history of the car after it was introduced into the country by the importation on 24th April 1950, is this. It was released to Doyle by the Customs. Doyle sold it to the defendant, one Honan, on 30th June 1950. The defendant Honan thereupon sold it to the plaintiff Burton on 14th July 1950, and in the plaintiff Burton's hands it was seized by the Customs on 22nd December 1950. The convictions took place on 23rd April 1951. (at p176)

10. On authority it is clear that under the provisions of s. 229, provided the facts exist which justify a forfeiture, the title to the goods vests in the Crown when the forfeiture takes place in consequence of the occurrence of the facts. No further proceedings are requisite to make title, although of course further proceedings may be necessary either to vindicate the title of the Crown or to exclude the claim of some person asserting a right to the goods. (at p176)

11. In point of fact elaborate provisions are made in the Customs Act for the seizure of the goods, for lodging a claim when the goods are seized, and for a notice requiring the claimant to proceed to establish his title to the goods. Those provisions, which for the purposes of this case it is unnecessary to discuss, are s. 203 to s. 207. The plaintiff Burton in fact gave notice under s. 205 but we are not informed whether he was required to pursue his notice by entering an action under s. 207. (at p176)

12. In the proceedings in the Supreme Court the facts which I have stated were ascertained and the

purchaser of the goods relied upon the provisions to which I have referred as provisions showing that he had lost title to the goods. He relied upon the seizure as disturbing his peaceful possession of the goods and he contended that the implied warranty under The [Sale of Goods Act](#) therefore gave him a right to damages. The vendor, however, answered him by saying that the relevant provisions of the Customs Act under which all this was done were invalid as being beyond the powers of the Commonwealth. That allegation necessarily raised a question as to the limits inter se of the constitutional powers of the Commonwealth and the constitutional powers of the State. Upon that arising, s. 38A of the Judiciary Act, as it has been construed and upheld in this Court, put an end to the jurisdiction of the Supreme Court to proceed with the matter, and s. 40A of the Judiciary Act ipso jure transferred the proceedings into this Court. It was in that manner that they were brought before McTiernan J. (at p177)

13. It will be seen that the residual question upon which the rights of the parties appear to depend is the validity of the material provisions of the Customs Act. Now s. 229 upon which the forfeiture rests contains a list of goods which are forfeit to the Crown when the conditions which the earlier paragraphs of that section contain are fulfilled. Section 229 rests in part upon par. (i.) of [s. 51](#) of the [Constitution](#) and in part upon par. (ii.) of [s. 51](#) of the [Constitution](#). For example, par. (a) of s. 229 makes forfeit all goods which are smuggled or unlawfully imported, exported or conveyed. Smuggling is an offence under provisions which are for the protection of the duties, and may therefore be referred to the power with respect to taxation. The words "unlawfully imported" include the importation of imports which are absolutely prohibited irrespective of their dutiable character, and it may therefore be referred to par. (i.) of [s. 51](#) of the [Constitution](#), that is to say the power over trade and commerce with other countries and among the States. (at p177)

14. The authority of the Commonwealth Government to impose forfeitures may be said to arise directly from the respective powers to which I have referred as a matter fairly within the scope of the substantive power to deal with, on the one hand, Customs duties, and, on the other, importation under the commerce power. But another view of the matter is to treat the power to impose a forfeiture in the case of offences as something which is incidental to the main power. There has in this Court been some discussion as to the use of par. (xxxix.) of [s. 51](#) in cases where the extent of the subject matter of a substantive power of the Commonwealth is involved, and the question is whether a provision in a statute may be supported as directed to carrying out the main power by providing for a matter incidental to the subject matter. The view which I personally have expressed is that everything which is incidental to the main purpose of a power is contained within the power itself so that it extends to matters which are necessary for the reasonable fulfilment of the legislative power over the subject matter in accordance with the maxim *quando lex aliquid alicui concedit, concedere et illud videtur sine quo res ipsa valere non potest*. But it has appeared to me that par. (xxxix.) of [s. 51](#) is related not so much to matter incidental to the subjects placed under the legislative power of the Commonwealth but rather to matters which arise in the execution of the various powers reposed in the Legislature, the Judiciary and the Executive. But the distinction is for present purposes immaterial because it produces the same result, namely, that the Parliament may in the exercise of any of the substantive powers given by [s. 51](#) make all laws which are directed to the end of those powers and which are reasonably incidental to their complete fulfilment. (at p178)

15. In the present case the question at issue depends upon the operation of the forfeiture and seizure provisions (ss. 229 and 203 of the Customs Act) and the operation of s. 262. (at p178)

16. The operation of the power of forfeiture is not restrained either in point of person or, except in a qualified manner, in point of time. It is said that goods which might be forfeited under the words of

the provision to which I have referred are exposed to forfeiture notwithstanding that they go into home consumption and are released from the control of the Customs for that purpose, and that they may be found in the hands of persons who have dealt with them quite honestly and have acquired apparent title to them as the last of a line of successive people all dealing in perfect bona fides and for value. (at p178)

17. As to s. 262, it is said that a forfeiture may result, from the operation of that section, of goods which are in the hands of a person who has obtained them innocently after they have gone into home consumption, and that by the conviction of the offender who imported them unlawfully into the country the innocent purchaser is left with no right to contest the legality of the forfeiture but has lost his goods in consequence of a proceeding to which he is not a party. (at p178)

18. The preliminary question with which we are concerned is whether those two features of the operation of the provisions drive it beyond the application of the incidental power. On that subject, which is one of degree, we have had the advantage of a discussion on both sides, which has drawn our attention to the material considerations. On one side it is pointed out that injustice may occur to individuals who are innocent, and that they may be involved in the loss of property for which they can only have a recompense by recourse to the person who has sold it, who may, of course, not be able to restore the purchase money. On the other side it is pointed out that in the history of English and Australian Customs legislation forfeiture provisions are common, drastic and far-reaching, and that they have been considered a necessary measure to vindicate the right of the Crown and to ensure the strict and complete observance of the Customs laws, which are notoriously difficult of complete enforcement in the absence of strong provisions supporting their administration. These matters of incidental powers are largely questions of degree, but in considering them we must not lose sight of the fact that once the subject matter is fairly within the province of the Federal legislature the justice and wisdom of the provisions which it makes in the exercise of its powers over the subject matter are matters entirely for the Legislature and not for the Judiciary. (at p179)

19. In the administration of the judicial power in relation to the [Constitution](#) there are points at which matters of degree seem sometimes to bring forth arguments in relation to justice, fairness, morality and propriety, but those are not matters for the judiciary to decide upon. The reason why this appears to be so is simply because a reasonable connection between the law which is challenged and the subject of the power under which the legislature purported to enact it must be shown before the law can be sustained under the incidental power. (at p179)

20. In the present case it appears to us that these are Customs provisions which are of a standard pattern, with the possible exception of s. 262, and that they would all be regarded as fairly and reasonably representing laws in relation to Customs and matters arising thereout, and that is so whether they are regarded as under the trade and commerce power or under the taxation power. As I have explained, they are in part referable to the one and in part referable to the other, and in some case referable indifferently to both. Section 262 is, however, a provision, which, according to the passage cited from Dr. Wollaston's book, was new in the Customs legislation of 1901. Its purpose is to make the conviction of the offender decisive on all matters of fact upon which the forfeiture of the goods depends. In the absence of that provision, if there was a contest as to the occurrence of the matters of fact upon which the forfeiture depended, it would be necessary to have the issue of fact decided, either in a proceeding which results from s. 207 of the Act or in an independent action for trespass brought by the supposed owner of the goods against a Customs authority in which he asserted that the seizure was unlawful. Such a proceeding would, of course, meet with difficulties if the officers pleaded the provisions of the Act which protect them in the case of a bonafide exercise

of their powers on reasonable grounds (cf. s. 220). (at p179)

21. Section 262 takes a course which brings such an issue speedily to a final conclusion. So far as the powers to make laws on matters incidental to trade and commerce, or to taxation, are concerned, it appears to us that it is fairly within the legislative power they confer to provide that conviction shall operate as a condemnation of the goods involved. (at p180)

22. But still another objection to s. 262 has been advanced. It is an objection which relates to s. 262 in its application to s. 229. The objection is made under par. (xxxi.) of [s. 51](#) of the [Constitution](#). That provision empowers the Commonwealth Parliament to make laws with respect to the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws. The question whether provisions for the forfeiture of property for an offence committed in connection with that property come within that legislative power, guarded as it is by the requirement that just terms must be afforded, has been adverted to in this Court on more than one occasion, but we have not found it necessary to give any decision on the question. But, in the course of the arguments in which it has been referred to, it has always been treated as obvious that if the purpose of the forfeiture is to bring a penalty upon the offender it could not come within [s. 51](#) (xxxi.), it not being an acquisition of property for any purpose in respect of which the Parliament has power to make laws within that provision. Alternatively it has been said that even if it was within [s. 51](#) (xxxi.) there is nothing unjust in a provision forfeiting the property of the offender as part of the punishment for the offence. (at p180)

23. But in the present case s. 262 brings about these further consequences. Facts having occurred, as the Crown alleges, giving rise to forfeiture and the goods having passed out of the hands of the Customs, they may be found in the possession of an innocent person. He has possession of the goods, and, as against everybody but the true owner - who, if the forfeiture has taken place, will be the Crown - he has a possessory title. (at p180)

24. It is argued that, as a consequence, s. 262 of the Customs Act dispossesses him, or at least seizures may have dispossessed him and then s. 262 makes conclusive the right so to dispossess him; he is thus left without his goods and without any title to his goods, because s. 262 purports to make the conviction of the offender conclusive on the subject. It leaves the innocent purchaser without any right to contest the forfeiture. It is said that that does not give him just terms, because just terms require that he should have a right to contest a forfeiture. (at p180)

25. The short answer to this contention is that the whole matter lies outside the power given by [s. 51](#) (xxxi.). It is not an acquisition of property for any purpose in respect of which Parliament has power to make laws. It is nothing but forfeiture imposed on all persons in derogation of any rights such persons might otherwise have in relation to the goods, a forfeiture imposed as part of the incidental power for the purpose of vindicating the Customs laws. It has no more to do with the acquisition of property for a purpose in respect of which the Parliament has power to make laws within [s. 51](#) (xxxi.) than has the imposition of taxation itself, or the forfeiture of goods in the hands of the actual offender. (at p181)

26. For these reasons I am of opinion that the inter se questions referred to the Full Court should be answered that the provisions are valid. (at p181)

27. That, then, leads to the further question what should be done with the proceedings transferred to this Court from the Supreme Court of Queensland. (at p181)

28. Having disposed of the validity of the provisions, we have removed the sole question which appeared to the learned Chief Justice of Queensland to stand in the way of his giving a decision, and it would be competent for this Court to decide the proceeding completely. That, however, does not appear to be altogether a desirable proceeding, because the assessment of damages is a matter outstanding. And it may indeed be possible that the learned Chief Justice of Queensland may not regard other questions as having been covered by the interim reasons that he gave. (at p181)

29. It is open to us to remit any part of the cause that we think may require further trial; and in my opinion that is the proper course to take so that final judgment may be given in the Supreme Court of Queensland. (at p181)

30. In the order made by McTiernan J. referring the matter to this Court, his Honour included the question whether the Customs Act operates so as to empower an officer to seize forfeited goods after they have passed into the hands of the bona-fide purchaser for value. That, of course, depends not only on the validity of the provisions, but in some degree upon their interpretation. No argument has been advanced to us which would justify our giving an interpretation to them which would exclude bona-fide purchasers for value. There is no language in any of the provisions which would justify such a form of construction, and it could only be arrived at by a very violent implication based only upon general considerations. We do not think that such an implication can be made. (at p181)

McTIERNAN J. I agree entirely with the reasons of the Chief Justice. I have nothing to add. (at p181)

WEBB J. I agree. (at p182)

KITTO J. I agree. (at p182)

ORDER

Declaration that ss. 203, 229 (b), 229 (i) and 262 of the Customs Act 1901-1950 are valid. Declaration that the Customs Act operates so as to empower an officer of Customs to seize forfeited goods although they have passed into the hands of a bona-fide purchaser for value. Cause remitted to Supreme Court of Queensland for final judgment. Defendant to pay costs of all proceedings in this court, other than those of intervenor.

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