[HIGH COURT OF AUSTRALIA].

D. & W. MURRAY & Co. LTD. . . . APPELLANTS;
PLAINTIFFS,

AND

THE COLLECTOR OF CUSTOMS . RESPONDENT.
DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1903.

Dec. 8, 9.

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

The Commonwealth of Australia Constitution Act (63 & 64 *Vict. c.* 12)—*The Constitution, secs.* 92, 95—*Customs Tariff* (*No.* 14 *of* 1902), *secs.* 4, 5—*Customs Duties Act* (*W.A.*) (1 *Edw. VII., No.* 3) *sec.* 1.

Western Australian Parliament—Power to impose Duties—Goods of Australian Origin—Imposition of Duties on Foreign Goods—Duties imposed by Parliament of Western Australia on goods of Australian origin higher than rate prescribed on like goods of Foreign origin by Federal Parliament—Rate of Duty on Foreign Goods to be computed according to Western Australian tariff—"Like Goods," meaning of.

The power of the Parliament of Western Australia under sec. 95 of the Constitution to tax goods by way of customs duties is as unfettered, so far as regards the description of goods to be taxed, as it was before the establishment of the Commonwealth; but the duties, as prescribed by that Parliament, do not attach, by virtue of the Western Australian Tariff Act, to goods which are imported from beyond the limits of the Commonwealth.

The imposition of duties on foreign goods is within the exclusive authority of the Parliament of the Commonwealth. The 3rd paragraph of sec. 95 of the Constitution is to be read as a governing enactment qualifying the construction of every Federal tariff. Its effect is, that if the rates imposed by the Western Australian tariff on any goods of Australian origin are higher than the rates prescribed by the Federal tariff upon the importation of like goods, that tariff is to be read in Western Australia as if the higher rate were prescribed by it. The taxation of foreign goods is therefore the act of the Parliament of the Commonwealth, and not of the Parliament of Western Australia.

The expression "like goods" in sec. 95 is merely a term of comparison; it includes such goods of non-Australian origin as are of the same description as the goods mentioned in the Western Australian tariff, and is not limited to goods of a class which is presently of Australian origin.

APPEAL from the Supreme Court of Western Australia.

H. C. OF A. 1903.

MURRAY & CO. v. COLLECTOR OF CUSTOMS.

This action was brought in the Supreme Court of Western Australia for the recovery of money paid under protest by the plaintiffs to the Customs Department as duty on certain goods imported by them into Western Australia from beyond the limits of the Commonwealth, such goods being of descriptions not presently manufactured or produced within the Commonwealth. There was also a claim for interest on such money. By the Western Australian *Customs Tariff* (1 Edw. VII., No. 3) a duty was imposed on such goods at a higher rate than was imposed on goods of a like description by the Federal *Customs Tariff* 1902, and duty was claimed and collected on the goods at the higher rate.

On the hearing before McMillan, J., judgment was given for the plaintiffs, and that judgment was, on appeal, reversed by the Full Court, consisting of Stone, C.J., and Parker, J. From the judgment of the Full Court the plaintiffs now appealed to the High Court.

For the purposes of the appeal it was agreed that all the goods in question should be taken as having been directly imported into Western Australia from beyond the limits of the Commonwealth.

Pilkington (with him *Northmore*) for appellants. The question of law arises under sec. 95 of the Constitution. Under the powers conferred by that section the Parliament of Western Australia passed the Act 1 Edw. VII. (No. 3) reimposing all duties then in force in Western Australia. That Act came into operation after the date of the imposition of uniform duties of Customs. The Western Australian Act, which so reimposed the original tariff, contains provision for a higher duty being paid upon the goods in question than was imposed by the Federal tariff on like goods, and the question is, whether, upon that state of facts, the local tariff imposes such higher duty. The intention of the framers of the Constitution as to the construction of sec. 95 is to be gathered from the sections preceding it. Sec. 86 gives the Executive Government of the Commonwealth power to collect and control duties of Customs, and sec. 88 provides that uniform duties of Customs shall be imposed within two years after the establishment of the Com-

monwealth. These duties were in fact imposed by the *Customs Tariff* 1902, which provides, in sec. 4, that uniform duties of Customs should be deemed to have been imposed as from the 8th October, 1901, and after that the power of imposing such duties became exclusively the right of the Executive Government of the Commonwealth, inter-state freetrade being provided for by sec. 92 of the Constitution. Sec. 93 of the Constitution shows clearly the meaning of the words "imported" and "passing into"; "imported" being used in regard to goods coming from abroad, and "passing into" being used when the goods pass from one State into another State. The meanings of those expressions are pointed out in Quick and Garran's "Constitution of the Commonwealth," p. 859. Sec. 95 begins by giving a limited right to the Parliament of Western Australia to impose certain duties of Customs on goods passing into that State, and not originally imported from beyond the limits of the Commonwealth, that is power to impose duties of Customs upon goods of Australian origin.

The intention was to give a power of imposing effective duties upon goods of Australian origin passing into Western Australia from any of the Eastern States. If the section had stopped there it might have worked an injustice by empowering Western Australia to place a higher duty on an article manufactured in the Eastern States than that imposed by the Federal tariff upon a foreign article. In order to prevent that, it was enacted by the third paragraph of sec. 95 that, when the duty on any goods under this section is higher than the Commonwealth duty on like goods, then such higher duty shall be collected on the goods when imported into Western Australia. That provision put an end to that danger by enacting that the foreign article should pay the same duty as a State-grown or State-manufactured article passing into Western Australia. The power of the Western Australian Parliament was limited to imposing duties upon Australian goods; no goods could be subject to any duty under the Western Australian law unless they were of Australian origin.

Then the third paragraph was enacted to be correlative to that, and to impose upon similar goods coming from abroad a like duty. The primary meaning of the words of the section is that no goods can be subject to a tax under either the 1st or 3rd

H. C. of A. 1903.

MURRAY & CO. v. COLLECTOR OF CUSTOMS.

paragraphs of the section unless they are themselves goods of Australian origin, or, if not, unless like goods of Australian origin in fact exist.

[GRIFFITH, C.J.—Is not that going too far ?]

[O'CONNOR, J.—Then there would have to be an inquiry as to whether goods of the same description are or are not produced in Australia.]

[GRIFFITH, C.J.—And if the production of those goods in Australia ceased, would the duty cease ? I have seen rice mills at work in Australia, but I do not know of any now.]

[BARTON, J.—There were cotton mills in Queensland, which may work again at any moment. Suppose there were only one cotton mill, would the duty be dependent on the operation of that mill ?]

The words are capable of that meaning. The first paragraph of the section is clearly enacted to limit the duties to goods of Australian origin, the third paragraph is intended to be correlative to the first paragraph, so that you only have goods of Australian origin on one side and goods similar to them on the other. If this were not so, the third paragraph would give an indirect power to Western Australia to tax foreign goods. That is entirely contrary to the intention of the Constitution, and would give the Western Australian Parliament a co-ordinate power with the Federal Parliament to tax foreign goods. This construction fully carries out the express intention of the Act, and the Court will endeavour if possible so to construe it. *The Caledonian Railway Co.* v. *The North British Railway Co.*, (1881) 6 App. Cas., 114. The difficulty in this case arises because of the peculiar combination of the words "goods passing into that State and not originally imported from beyond the limits of the Commonwealth," if those words were not joined by "and" the meaning would be plain.

[BARTON, J.—Do you think there is any difference when reading that section with or without the "and" ? If I might be permitted to give an opinion, I should say that the conjunction was placed there to make the reading a little more easy. Supposing the Parliament of Western Australia imposes a duty upon something not yet produced in Australia, is such imposition invalid,

and, if so, does the right to impose that duty arise subsequently if the goods are subsequently produced?]

There would be no duty in operation. If we take an article admittedly not manufactured in Australia, and read the name of that article into sec. 95 in the place of the word "goods," that section gives no power to the Western Australian Parliament to impose a duty on such goods.

[O'CONNOR, J.—Must you not read the word "imposed" into that section to fully illustrate your example? You would have to read it this way—"If at any time during the first five years the duty imposed on any buttons under this section, &c."]

It is carefully omitted from the Act.

[BARTON, J.—Does not that word "imposed" in that section contemplate the Commonwealth altering its duties? Was it necessary for the draftsman to insert it after the first portion of the section?]

It is contended that if we read into that section the name of any goods which are not manufactured in Australia, Western Australia can impose no duty upon them. Take cotton piece goods. At the present time the Western Australian Parliament cannot impose a duty upon cotton piece goods which could be collected, because they are not produced in the Commonwealth.

[BARTON, J.—Your construction raises this difficulty. There would be a necessity of holding protracted inquiries for the purpose of finding out whether or not some small number of men might or might not be making buttons out of bone in Australia.]

The difficulty which might arise would be small, and anyone manufacturing for business purposes would certainly let the Customs authorities know. The Legislature could never have intended to give to Western Australia the power to tax goods which never had been and never can be manufactured in Australia. It might not be invalid under the powers of the *Constitution Act*, but it would not impose any operative tariff, and consequently paragraph 3, which is intended to impose a correlative duty, could not come into operation.

[GRIFFITH, C.J.—No goods are taxable under the Western Australian tariff unless they are goods of Australian origin. Is there anything to prevent the Parliament of Western Australia from

H. C. OF A. 1903.

MURRAY & CO. v. COLLECTOR OF CUSTOMS.

including goods in their tariff merely because goods of that class are not presently manufactured in Australia? The State Act operates simply as a tax upon those goods if produced in Australia, and afterwards passing into Western Australia. That being so, what are "like goods"?]

It means that the Western Australian Parliament has power to impose duties on goods of Australian origin. But there must be goods upon which to impose the duty before the duty is imposed.

Burt, K.C., with him *F. M. Stone*, for the respondent. The construction of the section is simple. If the duty imposed under the local Act is higher than the Commonwealth duty imposed upon the importation of similar goods from abroad, whether similar goods are produced in Australia or not, the higher duty shall prevail. The question of duty in every case is to be determined by comparing the Commonwealth tariff with the local tariff under the first portion of sec. 95. To give effect to the appellant's contention, before these goods could be taxed it would be necessary to consider—(*a*) are similar goods produced within the Commonwealth, (*b*) are they capable of being so produced, and (*c*) are they when so produced brought into this State. "Like goods" is clearly the description of the goods of the same class as are spoken of in the Western Australian tariff, irrespective of where they come from. If sugar were imported, the simple test would be to see which tariff imposed the higher duty on sugar, and that duty would be collected. Everything will be presumed against an interpretation which would make the answer to the question of what duty is payable dependent upon outside facts. It could not have been intended that the Collector of Customs was to have knowledge of every manufacture however small.

He could not be expected to ascertain whether any particular goods are produced or capable of being produced in some part of Australia. Sub-sec. 3 of sec. 95 may appear to go a little beyond what was originally intended, but it is clear that the Legislature made no attempt there to distinguish between goods produced or not produced in Australia.

It would be idle to deny that this State can only tax what we call Australian goods. "Goods" in the third paragraph refers to

foreign goods; you must read in the word "imposed" after the word "duty." The duty imposed may extend over thousands of items not produced here, but as soon as they come in it is payable. It is no hardship upon Western Australia to follow the words of the section as they appear, because that can be remedied. If there are goods mentioned in the local tariff which are not produced in Australia the remedy lies in the hands of the Legislature to take off that duty. Western Australia spread a large net when they re-imposed all their duties under the first part of sec. 95. The word "goods" in that sub-section can only refer to the goods enumerated in the tariff and not to particular goods which come into the State for the moment. There is the Western Australian Tariff on the one hand and the Federal Tariff on the other, and consequently the Collector has nothing to do but to compare the two tariffs and charge the higher. He has nothing to do with the question of whether they are produced in Australia or not.

Where the Parliament of Western Australia has imposed a duty on any goods, this section of the Constitution imposes a corresponding duty upon like goods. It is impossible in a tariff to deal with goods individually; they must be dealt with in classes. If the Western Australian Parliament taxes Australian goods of a certain class, and foreign goods of that class come to Western Australia, the duty in the higher tariff must be collected.

Pilkington replied.

Cur adv. vult.

9th Dec.

GRIFFITH, C.J. This action was brought by the plaintiffs, who are importers, against the Collector of Customs to recover a sum of money demanded by the Customs Department from the plaintiffs on the importation of certain goods into Western Australia, and paid by the plaintiffs under protest. For the purposes of this appeal it is to be taken that all the goods in question were imported into Western Australia from beyond the limits of the Commonwealth. An incidental question which might have been raised in respect of a small quantity of the goods which had been first landed in South Australia was not pressed, and it is unnecessary to express any opinion upon it. The contention on behalf

H. C. OF A. 1903.

MURRAY & CO. v. COLLECTOR OF CUSTOMS.

of the plaintiffs is that these goods were not taxable except according to the scale prescribed by the Commonwealth tariff; the Customs authorities on the other hand say that the rate of duty payable upon them is to be computed according to what was called in argument the Western Australian tariff. The question depends entirely upon the construction of sec. 95 of the Constitution. Now the Constitution, as has been pointed out in argument, and in the judgment appealed from, provided that on the establishment of the Commonwealth the collection of Customs duties should pass to the Federal Government (sec. 86). Uniform duties of Customs were required to be imposed within two years after the establishment of the Commonwealth (sec. 88). When that was done the power of the State Parliaments to impose Customs duties was to cease, and all existing State Customs laws were to become inoperative (sec. 90). From that time, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, was to be absolutely free (sec. 92). If the Constitution had said no more, it would have followed that after the imposition of uniform duties of Customs no duties could have been collected on goods passing into Western Australia from any other State in the Commonwealth. Now it is a well-known fact that at the establishment of the Commonwealth Western Australia was, as indeed it still is, separated by great tracts of desert from the other States, and that large quantities of goods were imported by sea from those States, from which a considerable portion of the Customs revenue of the State was derived. That source of revenue would have been altogether taken away but for sec. 95, which makes special provision with regard to Western Australia. Up to this time the right of Customs taxation had belonged to each State; in future it was to belong exclusively to the Parliament of the Commonwealth. It was quite inconsistent with the scheme of the Constitution that any State should retain power to tax goods coming from beyond the limits of the Commonwealth. On the other hand it was equally inconsistent with that scheme that the Commonwealth should tax goods passing from one State to another. If that was to be done at all, it could only be logically and consistently done by the State Parliament. That view was adopted by the framers of the Constitution,

and by sec. 95 it was provided that in the case of Western Australia the Parliament of the State might during the first five years after the imposition of uniform duties of Customs, impose duties of Customs upon goods passing into that State and not originally imported from beyond the limits of the Commonwealth. If that provision had stood alone, it might have resulted in a preference in favour of foreign goods; there might have been goods which would be free of duty under the Federal tariff when imported into Western Australia from beyond the seas, but which would be chargeable with duties if they came from the Eastern States. That result would have been inconsistent with the notion of freedom of trade amongst the States, and also inconsistent with the notion of equality amongst the States of the Commonwealth, which the whole Constitution contemplated. To meet this difficulty the third paragraph of sec. 95 was enacted, providing that—"If at any time during the [first] five years the duty on any goods under this section is higher than the duty imposed by the Commonwealth on the importation of the like goods, then such higher duty shall be collected on the goods when imported into Western Australia from beyond the limits of the Commonwealth." The first contention on the part of the appellants is that the only goods which the Parliament of the State of Western Australia is empowered to tax by way of Customs duties are goods that are not originally imported from beyond the limits of the Commonwealth—that is, they must be of Australian origin. That, of course, is clear. The taxation will not be effective unless they are goods of Australian origin, because by the express terms of the section the taxes cannot apply to any other goods. The power of the State Parliament, *i.e.*, their effective power, is limited to that extent. Then it is contended, further, that the Parliament of Western Australia cannot impose duties upon goods of any class which is not a class of goods of Australian origin; that is to say, if there is any class of goods which cannot, for the time being, be said to be a class of goods which, as a matter of fact, are then produced or manufactured in Australia, the tariff of Western Australia is inoperative as to such goods. The fallacy in the argument of the appellants arises from that common and fruitful source of error, the use of the same

H. C. OF A. 1903.

MURRAY & CO. v. COLLECTOR OF CUSTOMS.

word in two different senses in the same argument. The word "imposition" is used throughout the section. It has been used in two senses in the argument; first, as denoting the act or action of the Parliament of Western Australia in prescribing that certain duties shall be payable upon certain classes of goods when they come into the State, and secondly, in the sense of the effective collection of duties upon specific or particular parcels of goods when they come within the limits of the State. These are, of course, two quite different senses. The Parliament of Western Australia has no power in the latter sense to impose duties upon goods not of Australian origin, nor until they actually come within the borders of the State; nor has any other Parliament power to impose duties in that sense upon any goods until they are actually imported. But, using the term in the first sense, the power of the Parliament of Western Australia to prescribe the duties to be collected upon goods when they come into the State is unlimited. They may prescribe as to any class of goods such duties as they may think fit, although the direction that such duties shall be collected is, from the nature of the case, ineffective and inoperative until the goods are actually imported, and then only applies to goods of Australian origin. But that is a very different thing from a restriction upon the power of the Parliament in the exercise of its formal legislative authority. The authority of the Western Australian Parliament under this section to determine what descriptions of goods should be subject to import duties is just as unfettered as it was before the establishment of the Commonwealth; but the duties, when prescribed by that Parliament, do not attach to goods unless they are of Australian origin, nor until they have crossed the borders. It was contended, however, that, if that were so, the indirect effect would be that the Western Australian Parliament would have power to tax foreign goods coming from abroad. That may be the indirect effect of sec. 95 of the Constitution, but the power to impose duties on such foreign goods was not given to the Parliament of Western Australia, but was reserved to the Parliament of the Commonwealth. The taxation of goods coming from beyond the limits of the Commonwealth being for the Federal Parliament, the third paragraph of this section may be read, and indeed, must

be read, as a proviso or governing enactment qualifying the construction of every Federal tariff. It is equivalent to saying that if in any case the rates prescribed by the Western Australian tariff on goods of Australian origin are higher than the rates prescribed by the Federal tariff upon like goods, then the tariff is to be read in Western Australia as if the higher rate were prescribed by the Federal tariff. The taxation of foreign goods, therefore, is the act of the Federal Parliament, and not of the Parliament of Western Australia. With regard to goods of Australian origin, the Western Australian Parliament adopted a very simple mode of exercising their power. They prescribed that "the duties of Customs in force in Western Australia at the date immediately preceding the imposition of uniform duties of Customs under the *Commonwealth of Australia Constitution Act*, so far as they relate to goods passing into Western Australia, and not originally imported from beyond the limits of the Commonwealth, are hereby reimposed, and shall continue in force, subject to the provisions of sec. 95 of the said Act." In other words it was enacted that certain prescribed duties should be levied upon all the classes of goods enumerated in the former Western Australian Tariff Acts, which, being of Australian origin should be imported into Western Australia, whether from another State or from abroad. All that is left is to construe the third paragraph of sec. 95 of the Constitution. It is contended for the appellants that the expression "like goods" must mean goods of some class which can be described as being a class of goods which are presently of Australian origin. Those are not the words of the Act. The sentence is elliptical, and if we supply the ellipsis, it will at once be seen that that is not the comparison prescribed. Supplying the ellipsis, the sentence would read, "If at any time during the five years the duty which the Parliament of Western Australia has prescribed to be collected on goods of Australian origin is higher than the duty imposed by the Commonwealth upon the importation of like goods of non-Australian origin, then such higher duty shall be collected." The comparison is between taxable goods of Australian origin, and other goods of non-Australian origin which are spoken of as "like goods." The contention of the appellants is that the term "like goods"

H. C. OF A. 1903.

MURRAY & CO. v. COLLECTOR OF CUSTOMS.

means a class of goods of which there are presently some of Australian origin. But the real basis of the comparison is the character of the goods *qua* goods, not their character as regards their place of origin. It may be that the Legislature did not intend that the section should have so far-reaching an effect, but our duty is to construe the words as we find them. In construing them it is not unimportant to remember that this is a provision relating to a tariff, and it is common knowledge that tariffs have serious effects on trade. It is important that persons engaged in trade should know the existing law, and it is said to be important that they should also know what the law is likely to be in the near future; at any rate it is important that they should be able to know by reading the Statute what the law is upon any particular point. If the contention of the appellants is correct, the question whether duty is collectable upon any specific goods brought from abroad could not be answered by looking at the Statute and seeing whether any and what duties are imposed upon goods of Australian origin and of the same class, but it would be necessary to go on to inquire whether at any particular moment—I suppose the moment of importation—there are any goods of Australian origin of that class in existence anywhere within the limits of the Commonwealth. That would be an extremely difficult inquiry. Mention was made in argument of cotton piece goods. There is a cotton mill in Australia, which for some time turned out cotton piece goods, but which at this moment is, I believe, idle. If the contention of the appellants is accepted, cotton piece goods would be taxable at the Western Australian rate when imported from abroad into Western Australia, if at that time that mill was turning out cotton piece goods, but if it had stopped turning them out the duty would not be collectable, and when the mill resumed operations the duty would again become effective. The question of the time when operations were resumed would further have to be determined. Would it be the time when the raw yarn went to the mill, or when finished goods were sent out, or would it be when some of its products were imported into Western Australia? Cotton piece goods could hardly be manufactured without the existence of the industry being generally

known, but there are many things as to which it is difficult to say at any given moment whether they are or are not presently of Australian production. Take the case of tea; I have seen tea growing in Australia; coffee is both produced and manufactured in Australia; flax I have also seen growing in Australia. It is absolutely impossible to make any complete list, and say that these are goods of Australian origin and those are not. Some remarkable results would follow from such a construction. A person desiring to import goods into Western Australia from Europe or America would not, when ordering them, know at what rate they would be taxable on arrival, because that would depend to some extent upon the will of other persons in some other part of Australia. Perhaps during the interval between the order and its execution some person would have grown or manufactured goods of the same class in Australia, in which event they would have become subject to the higher duty, and all the expected profit of the importer might be lost. Again, in any particular instance of assessment of duty, a dispute might arise whether goods of a like kind were produced or manufactured in Australia. One importer having been called upon, as the appellants were, to pay duty at the higher rate, would allege that there were no goods of that class produced or manufactured in Australia at that time, and the Collector of Customs might not be prepared with evidence to prove that there were any such goods. That importer would recover his money back. The next importer might, perhaps, pay duty at the same rate on the same day, and when his case came on for trial, the Collector of Customs might have ascertained, and be able to prove, that there were at the time of importation some goods of the kind in question produced or manufactured, say in North Queensland, and thereupon it would be decided that the higher duty was payable. The judgment in one case would not govern the other. The result would be an entire want of certainty on a matter in which certainty is of the greatest importance. A construction which would lead to such extraordinary results ought not, in my opinion, to be adopted, nor ought such an intention to be attributed to the Legislature, unless the words of the Statute are clear and unambiguous. But in my opinion that construction is

H. C. OF A. 1903.

MURRAY & CO. v. COLLECTOR OF CUSTOMS.

really excluded by the words of the Statute. No doubt a tariff Act may be so framed as to be applicable only upon the happening of a condition, and in that case the condition must be fulfilled before the duty can attach. The only condition imposed by the Constitution upon the power of legislation of the Western Australian Parliament is that the goods to be directly affected shall be imported from another State and be of Australian origin. As to the goods indirectly affected the only condition is that they are to be "like goods"—that is, goods of non-Australian origin, being of the same description as goods mentioned in the Western Australian tariff. The test to be applied when goods are imported from abroad into Western Australia is to look at the Western Australian Tariff, and if you find that goods of that description are taxable under that tariff at a higher rate than under the federal tariff, then the duty specified in the Western Australian tariff is the duty payable. If the tariff as it stands operates injuriously, it is for the Parliament of Western Australia to correct it; we have to interpret the Constitution as we find it. Upon the incidental matters which were raised before the learned judge of first instance, but which have not been pressed before us, it is unnecessary and undesirable to express an opinion. For these reasons I think the appeal must fail.

BARTON, J. I am content to base my judgment on the same reasons as those given by the learned Chief Justice, with whose opinion I concur. I think the appeal should be dismissed with costs.

O'CONNOR, J. I am of the same opinion.

Appeal dismissed with costs.

Pilkington moved for a certificate under sec. 74 of the Constitution, with a view to an appeal to His Majesty in Council.

Per Curiam. We do not think that the case falls within that section. It is unnecessary, therefore, to consider whether, if it did, this would be a fit case in which to grant a certificate.

Solicitors for plaintiffs, respondents, *James & Darbyshire.*

Solicitors for defendants, appellants, *Stone & Burt.*