

[HIGH COURT OF AUSTRALIA.]

ALEXANDER COWAN & SONS LTD. . . . PLAINTIFF;

AND

NICHOLAS LOCKYER DEFENDANT.

H. C. OF A. *Customs Act 1901 (No. 6 of 1901), secs. 130, 167—Customs Tariff 1902 (No. 14 of*
1904. *1902), secs. 3, 4, 5, 6—Dispute as to Customs duties claimed before Customs*
MELBOURNE, *Tariff in force—Retrospective effect of Customs Tariff—Duties of Customs*
August 17, 18. *“collected”—Money deposited.*

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

The words “duties of Customs collected pursuant to any tariff” in sec. 6 of the *Customs Tariff 1902* do not include money deposited with the collector of customs under an agreement in the terms of sec. 167 of the *Customs Act 1901*.

Prior to the passing of the *Customs Tariff 1902*, Customs duties, in accordance with the draft tariff then before Parliament, were demanded on the importation of certain goods, such goods not then being subject to Customs duty under the tariff of the State into which they were imported. The importer refused to pay the duty, but deposited with the collector the amount claimed. The *Customs Act 1901* had then been passed, and the deposit was made in supposed compliance with sec. 167 of that Act, which, however, had, in point of law, no application to the case of goods imported at that date. The goods in question were not included as dutiable goods in the schedule to the *Customs Tariff 1902*. In an action brought after the passing of the *Customs Tariff 1902* by the importer to recover from the collector the amount so deposited :

Held, that the money must be taken to have been deposited under an agreement in the terms of sec. 167, and which could be varied by the parties as to the limit of six months specified in that section.

Held, also, that the duty demanded was not legally payable, and that the plaintiff was entitled to recover the money deposited, notwithstanding sec. 6 of the *Customs Tariff 1902*.

MOTION for judgment on admissions of fact, referred by consent to the Full Court.

Alex. Cowan & Sons Ltd., the plaintiff, brought an action against Nicholas Lockyer, Collector of Customs, seeking to recover £132 7s. 7d. and interest thereon at the rate of 5% per

annum from the 23rd December, 1901, alleged to have been deposited by the plaintiff with the defendant as such collector pursuant to the provisions of the *Customs Act* 1901.

The following facts were for the purpose of the case admitted by the parties:—

1. That the plaintiff is a company carrying on business as manufacturing stationers at Sydney and elsewhere in the Commonwealth.

2. That in the month of December, 1901, the plaintiff imported into the Commonwealth at the port of Sydney, in the State of New South Wales, two envelope folding machines, *ex* "Varzin," for use in its factory at Sydney.

3. That at all times material to this action such goods were not dutiable by the Customs Tariff of the State of New South Wales.

4. That by the Federal Tariff introduced on 8th October, 1901, manufactures of metal were dutiable at 25% *ad valorem* subject to the following exemption:—"Machine tools used in the following industries and specified in Department's by-laws . . . paper-cutting, finishing and folding."

5. That no departmental by-law specifying any paper-cutting, finishing and folding machine tools as exempt was made until 23rd January, 1902.

6. That the defendant claimed that the machines in question were, under the Federal tariff, dutiable at 25% *ad valorem* as being manufactures of metal *n.e.i.* and insisted on plaintiff paying 25% *ad valorem* thereon.

7. The plaintiff, at the time of the said importation, and ever since, disputed the liability of the said goods to duty, and elected to deposit with the defendant as collector under the provisions of sec. 167 of the *Customs Act* 1901, the duty as claimed by him.

8. That on 23rd December, 1901, the plaintiff accordingly deposited with the defendant as such collector, the duty so claimed, amounting to £132 7s. 7d., being at the rate of £25 per cent. *ad valorem*, and the goods were thereupon delivered to the plaintiff.

9. That the *Customs Tariff* 1902 received the Royal assent on 16th September, 1902, and machines of the same description as those now in question were exempted from duty but such exemption was effected by a tariff alteration made by Parliament on the 28th January, 1902.

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By his defence the defendant contended that the money so deposited constituted a collection of duties of customs pursuant to sec. 6 of the *Customs Tariff* 1902, and was, therefore, by virtue of that section, to be deemed to have been lawfully imposed and collected.

Isaacs, K.C. (*Starke*, with him), for the plaintiff. Assuming it was legal to collect duties under the draft tariff, notwithstanding that the State tariff Acts were still in force, there was no collection of duties here at all. The course adopted of depositing the money claimed was for the purpose of preventing a collection. If the defendant's contention is correct, the plaintiff is put in the same position as if he had without any objection paid the amount claimed. The money was paid as a stake to the collector as a stakeholder, and was not paid to His Majesty. Sec. 6 of the *Customs Tariff* 1902 was not intended to close transactions that had purposely been left open. Sec. 5 of that Act makes the tariff contained in the schedule to it retrospective, and the question whether the goods were dutiable is to be determined by that tariff and not by the draft tariff. Sec. 6 cannot be interpreted as repealing the provisions of sec. 167 of the *Customs Act* 1901. *Dakins v. Seaman*, 11 L.J., Ex., 274; 9 M. & W., 788; *Hardcastle on Statutes*, 3rd ed., p. 331. [He also referred to *Sargood v. The Queen*, 4 V.L.R. (L.), 389; *Hamel's Law of Customs*, p. 93.]

Pigott (with him *Cussen*), for the defendant. Under the admissions no question arises whether there was any lawful power to demand any duties of customs at the time in question. The money having been deposited under sec. 167 of the *Customs Act*, the only question that now is open is whether the goods were then liable to or exempt from duty, having regard to the tariff proposals then before the Parliament. This money was received by the defendant in consequence of a demand for payment of duty in pursuance of the tariff then before Parliament, and was therefore "collected" within the meaning of sec. 6 of the *Customs Tariff*. That Act must be looked at, having regard to the subject matter and the state of things then existing. Up to that

time there was no right in Customs officers to collect any duties. The intention of the legislature was that, once goods had been taken through the Customs and duty had been paid on them, there was to be no refund.

[O'CONNOR, J.—That is as to duties in respect of which there was no dispute.]

It must include cases where there had been disputes. Otherwise, the whole intention of the legislature could have been defeated by making deposits. The only question now is whether this money was collected pursuant to the tariff. In sec. 5 the word "collected" means "gathered in" whether as a deposit or otherwise. The word is also used in sec. 272 of the *Customs Act*, and there it includes the whole process of getting in duties, and must include deposit. In sec. 6 it must mean "gathered in"—"got into the possession of the collector." This construction produces a uniform, clear and consistent result. As to the constitutional point, if the Commonwealth had then no power to levy duties, the plaintiff has paid the money under mistake of law.

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[GRIFFITH, C.J.—He paid it under duress.]

If he proceeded under sec. 167 he is bound. If no duties were then payable there is no more confiscation in regard to a deposit than there is as to duties actually paid.

[GRIFFITH, C.J.—Sec. 5 of the *Customs Tariff Act* says that the duties that are deemed to have been imposed as from 8th October, 1901, are the duties in the schedule. According to the defendant's construction that Act also says that another tariff is to be deemed to have been in force during the same period.]

The effect is that, as to matters that are closed by collection, the tariffs before the Parliament at different times are to be deemed to have been in force, but as to matters not closed the duties in the schedule are to be deemed to have been in force.

[GRIFFITH, C.J.—Sec. 6 may be a proviso to sec. 5.]

Cur. adv. vult.

GRIFFITH, C.J. This is an action by the plaintiff company, which carries on business in New South Wales, against the Collector of Customs of that State, to recover the sum of £132

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7s. 7d., deposited by it in December, 1901, upon the importation into New South Wales of certain envelope folding machines. At that time the goods in question were not liable to duty under the tariff of New South Wales, which was, as a matter of law, the only tariff then in force in that State. When the goods were imported, duty upon them was demanded by the defendant on the ground that under the tariff proposals then before the Parliament such goods were proposed to be made dutiable. The money was paid under protest, and as was understood by the parties, under the provisions of sec. 167 of the *Customs Act* 1901, which had come into operation on 4th October, 1901. Goods of the class in question were included in the draft tariff as laid upon the table of the House of Representatives on 8th October, 1901. When the tariff had passed through both Houses and the *Customs Tariff* 1902 came into force on 16th September, 1902, those goods were exempt from taxation. So that, as a matter of law, no duty was ever payable upon the goods; they were not taxable under the tariff of New South Wales, and they were not taxable under the Commonwealth *Customs Tariff*, and the only claim that could be set up was that they were taxable under the draft tariff laid on the table of the House of Representatives. When the goods were imported the importers claimed that they were not liable to duty, and deposited this sum of money. Sec. 167 of the *Customs Act*, which had then been passed, is in these words:—"If any dispute shall arise as to the amount or rate of duty or as to the liability of goods to duty, the owner may deposit with the collector the amount of duty demanded, and thereupon the following consequences shall ensue:—(1) The owner upon making proper entry shall be entitled to delivery of the goods. (2) The deposit shall be deemed the proper duty unless by action commenced by the owner against the collector within six months after making the deposit the contrary shall be determined, in which case any excess of the deposit over the proper duty shall be refunded by the collector to the owner with five pounds per centum per annum interest added." Now that section occurs in Part VIII. of the Act, beginning at sec. 130, which provides:—"This Part of this Act shall not affect any duties payable under any State Act." Therefore sec. 167 had, according to the law as it then existed,

no application to any duties that could then be collected. But, as we know, duties were being collected, as is usual in such circumstances, in accordance with the draft tariff. The parties, however, acted as if the section then applied as a matter of law. In my judgment, the proper conclusion of law to be drawn from these circumstances is that the money was paid, not under the legal conditions imposed by sec. 167, but upon terms similar to those expressed in the section, and as a matter of agreement between the party paying and the party receiving the money. That construction gets over the difficulty that this action was not brought within the limit of six months after the deposit was made, sec. 167 expressly providing that the deposit shall be deemed the proper duty unless an action is commenced within six months. Regarding the matter as we do in the light of an agreement between the parties, there can be no difficulty in extending the time for bringing this action, as has in fact been done, as stated in the pleadings.

These being the circumstances under which the deposit was made, it is clear that, at the time when it was made, no duty was payable by the plaintiff. It is also clear that no duty was payable under the *Customs Tariff* assented to on 16th September, 1902. Therefore the duty was never collectable under any existing tariff. But the defendant claims to be entitled to retain the money by virtue of sec. 6 of the *Customs Tariff*, which provides that:—"All duties of Customs collected pursuant to any tariff or tariff alteration shall be deemed to have been lawfully imposed and collected, and no additional duty shall be payable on any goods on which duty was so collected, merely by reason that the rate at which the duty was so collected is less than the rate of duty specified in this Act, and no duty shall be payable in respect of goods delivered for home consumption free of duty pursuant to any tariff or tariff alteration." "Tariff" is defined as the tariff proposed on 8th October, 1901. "Tariff alteration" is defined as "any alteration of the tariff since proposed in the Parliament," which means, I suppose, any alteration made by resolution in committee of ways and means. The item in question was in the tariff as proposed. It is contended that these duties were "collected" within the meaning of that section, that they

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were collected pursuant to the draft tariff, and therefore that the duties were to be deemed to have been lawfully imposed and collected. For the plaintiff it is answered that that is not the primary meaning of the words "duties of customs collected pursuant to any tariff or draft tariff;" that the section was intended to provide an indemnity, and put an end to disputes which might have arisen during the long period that elapsed between the introduction of the Customs Tariff Bill and the day when the Tariff became law. The words are probably open to the construction contended for by the defendant; but, if that construction were adopted, it would have the effect of changing the ownership of this money on that day. Up to that time the money had clearly been recoverable by the plaintiff if an action had been brought for that purpose. If, therefore, the section receives the construction contended for by the defendant, the effect would be to deprive the plaintiff of a vested right. Such a construction should never be adopted if the words are open to another construction. Comparing that section with the two preceding sections it will be seen that another construction is open. Sec. 4 provides that "The time of the imposition of uniform duties of customs is the eighth day of October, One thousand nine hundred and one, at four o'clock in the afternoon, reckoned according to the standard time in force in the State of Victoria, and this Act shall be deemed to have come into operation at that time." Sec. 5 provides that "The Duties of Customs specified in the Schedule are hereby imposed according to the Schedule, as from the time of the imposition of uniform Duties of Customs or such other later dates as are mentioned in the Schedule in regard to any particular items, and such duties shall be deemed to have been imposed at such time and dates," &c. The intention of the legislature, therefore, was to do what it was empowered to do by the Constitution, viz., to establish uniform duties of customs, and they declared that they established them as from 8th October, 1901, and they further declared that the duties so imposed were to be those contained in the schedule to the Act. Moreover, the only way in which the legislature can authorize the collection of customs duties is by imposing them as duties. It cannot authorize the collection of money as and for customs duties, not being customs duties,

but in lieu of them. They must impose them *quâ* customs duties. The legislature deliberately exercised that power in sec. 5 as to the duties mentioned in the schedule. If sec. 6 receives the construction which will support the defendant's contention, the result will be that the tariff laid on the table of the House of Representatives on 8th October, 1901, thereupon became a valid existing tariff, and the duties mentioned in it were thereupon imposed according to it and according to the alterations in it as the tariff was varied from time to time. Mr. Pigott admits that he must put his contention as high as that. If that was the intention of the legislature it was a very singular way to express it. I think if the legislature had been invited to pass such a law it would have hesitated to do so. Full meaning can be given to sec. 6 without that extraordinary construction, by holding that the legislature intended to deal with the practical difficulty which always arises under such circumstances. That is to say, the draft tariff was being varied from time to time. Some merchants were refusing to pay duties demanded of them, while others did not think it worth while to object to pay them. A great deal of money was collected under the draft tariff under circumstances which would probably have given those who paid it no right to recover it, as they would have paid it under a mistake of law. The legislature may very well have desired that all questions of that sort should be set at rest by that declaration. It was a very natural provision to make, and the language is very natural to express that intention. This is an intelligible construction of the section, and does not lead to the result of depriving anyone of vested rights. For these reasons I have come to the conclusion that the word "collected" ought not to be held applicable to, or to include, money deposited under an agreement that if it is not legally payable it will be returned. I therefore think that the plaintiff is entitled to judgment for the amount claimed and interest thereon at 5% per annum, with costs of the action.

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O'CONNOR, J. I agree with the *Chief Justice* that this money must be taken to have been received by the collector under an agreement in terms of sec. 167 of the *Customs Act*. The sole question to be determined at the time of the deposit of that money

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in December, 1901, was whether the plaintiffs were then legally bound to pay duty on these goods, and that continued to be the only question between these parties in reference to this money so in suspense until the bringing of this action. It is clear, for the reasons the *Chief Justice* has already given, that, but for sec. 6 of the *Customs Tariff Act* 1902, this money belongs to the plaintiff, and that the defendant as collector of Customs has no legal right to keep it. But the collector says that sec. 6 has given him a legal right to keep this money, because it has by retrospective effect made the draft tariff laid before the House of Representatives on the 8th October, 1901, the tariff that is to regulate the rights of the parties. The plaintiff, on the other hand, contends that the tariff which is to regulate his rights is the tariff contained in the schedule to the *Customs Tariff Act* 1902, and to which retrospective effect is given by sec. 5. The question for determination is which of these two contentions is correct.

The matter all turns upon the meaning of "collected" in sec. 6. If that word is to be considered as meaning "collected as and for duty" then it is clear that the section can have no application here, because this money was not paid as and for duty and was therefore not "collected" in that sense, but was paid as a deposit in order that a dispute about duty could be settled. On the other hand it is contended that "collected" has a much wider meaning, viz., money gathered in, whether by way of deposit or by way of duty. I am of opinion that sec. 6 cannot be read as contended for by the defendant, and for this reason. The plaintiff had a legal right to this money up to the date of the passing of the *Customs Tariff Act* 1902, because up to that date there was no duty legally chargeable on the goods. If sec. 6 is read as contended for by the defendant, the liability of the plaintiff will be determined, not by virtue of the tariff enacted in the schedule to the *Customs Tariff Act* 1902, but by virtue of the "draft tariff," as it is called, which was being acted upon, necessarily without any legal warrant at the time this money was deposited. it is a well-known rule in the construction of Acts of Parliament that, where there is a doubt as to the meaning of a word which is grammatically capable of being interpreted either as interfering with an existing right or not, the word will not to be construed as having a

retrospective effect so as to take away an existing right. If the construction which the plaintiff contends for is placed on this Act, not only is no right taken away, but, it appears to me, the intention of the parties in depositing the money is carried out. For what the parties deposited the money for was to ascertain what would be the duty properly payable under the tariff then being enacted in Parliament. That tariff is the tariff which is made law under sec. 5 of the *Customs Tariff Act* 1902, and to that tariff is given retrospective effect under sec. 5, which takes it back to the date when this money was deposited. Under that tariff the goods in question are on the free list, and reading the Act with that retrospective effect, there was no duty payable in December, 1901, in respect of these goods. Such an interpretation gives effect to the intention of the parties without any deprivation of rights. On the other hand, if the contention of the defendant is adopted, the plaintiff's right to this money, which was an existing right at the time of the passing of the *Tariff Act* 1902, will be taken away, and the rights of the parties will be determined, not by virtue of the tariff passed by Parliament, but by virtue of a tariff which never had any legal effect. For these reasons I agree with the *Chief Justice* that the plaintiff is entitled to recover the full amount claimed.

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*Judgment for the plaintiff for £132 7s. 7d.
and interest thereon at 5% per annum,
with costs.*

Solicitors for plaintiff, *Malleson, England & Stewart.*

Solicitor for defendant, *C. Powers*, Crown Solicitor for the Commonwealth.