Solicitors, for appellant, *Lee, Colquhoun & Bassett.*

Solicitor, for respondent, *The Crown Solicitor of New South Wales.*

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SAUNDERS v. BORTHISTLE.

[HIGH COURT OF AUSTRALIA.]

DONOHOE . . . . . APPELLANT;

AND

BRITZ . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *June*, 13, 14, 28, 29.

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

Commonwealth Customs Act (*No.* 6 *of* 1901), *secs.* 130, 144, 154 (*a*), 234 (*e*)—*Untrue declaration—Proprietary medicine—Value for duty—"Ordinary market value in the country whence imported"—Customs Tariff* (*No.* 14 *of* 1902), *secs.* 4, 5, 6—*Time of imposition of uniform duties—Validation of collections under tariff proposals—Effect of retrospective legislation—Special leave to appeal—Delay.*

On 16th October, 1901, the respondent made a declaration as to the value of certain medicinal preparations imported by him from abroad, which were not dutiable under the then existing tariff of New South Wales, but were made dutiable under the *Customs Tariff* 1902.

On 10th November, 1903, the respondent was charged under sec. 234 of the *Customs Act*, with having made an untrue statement in his declaration. It was admitted that the statement was true in the natural and ordinary meaning of its terms, and that it was only untrue when construed in the light of the artificial rule laid down in sec. 144 of the *Customs Act* 1901, for valuing goods of that kind (*a*).

(*a*) 144. All medicinal or toilet preparations not completely manufactured but imported for completing the manufacture thereof or for the manufacture of any other article by the addition of any ingredient or by mixing such preparations or by putting up or labelling the same alone or with other articles or compounds under any proprietary or trade name shall be irrespective of cost valued for duty and duty shall be paid thereon at the ordinary market value in the country whence imported of the completed preparation when put up and labelled under such proprietary or trade name less the actual cost of labour and material used or expended in Australia in completing the manufacture thereof or of putting up or labelling the same.

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The respondent was convicted and fined.

Held, that the conviction was bad, that the respondent was not guilty of any offence against the law existing at the date on which he made the declaration, and that there was nothing in the retrospective sections of the *Customs Tariff Act* 1902 that rendered him liable to be prosecuted subsequently in respect of it.

Held also, on motion to rescind the order granting special leave to appeal from the Supreme Court, that the order was properly made, the question raised being an important question of law, and of general interest to the mercantile community, that the attendance of the appellant at the taxation of costs, after the judgment of the Full Court appealed from, was not an act of acquiescence that would perempt the appeal, and that a delay of two months in applying for leave to appeal, the respondent not having been prejudiced thereby, was not, under the circumstances, a sufficient ground for rescinding the order of leave.

Decision of the Supreme Court (1904), 4 S.R. (N.S.W.), 116, affirmed.

APPEAL from a decision of the Supreme Court of New South Wales.

The respondent, Peter Britz, was convicted and fined, on 30th December, 1903, before a magistrate, upon an information dated 10th November, 1903, under sec. 234 of the *Commonwealth Customs Act* 1901. The offence with which he was charged was that he had, in a declaration produced to the appellant, J. T. T. Donohoe, a customs officer, made an untrue statement as to the value of certain goods imported by him. The goods in question were the ingredients of a proprietary medicine, which were not dutiable under the tariff then in force in New South Wales, but were made dutiable by the *Commonwealth Customs Tariff* 1902. On 19th February, 1904, the Supreme Court made absolute a Rule Nisi for a prohibition to restrain the appellant, who had laid the information, and the magistrate, from further proceeding against the respondent in respect of the information upon which he had been convicted and fined; *Ex parte Britz*, (1904) 4 S.R. (N.S.W.), 116. On 11th April, 1904, special leave was granted to appeal from the judgment of the Supreme Court.

The facts, and proceedings, with the material parts of the sections of the Customs and Tariff Acts, are stated in the judgment of the Court delivered by *Griffith*, C.J.

On 13th June, the respondent moved to rescind the order granting special leave to appeal, on the grounds (1) that the appellant was not entitled to have such leave, (2) that the matter

and questions involved in the judgment of the Supreme Court were not of a substantial character or of great public interest, and did not raise any important questions of law, and (3) upon further grounds appearing in an affidavit sworn and filed in support of the motion. That affidavit stated, amongst other things, that the costs of the rule absolute granted on 19th February, 1904, by the Supreme Court, had been taxed on 18th March, 1904; that negotiations took place between the solicitor for the respondent and the Crown Solicitor for payment of the said costs; that before the application by the appellant, on 11th April, for special leave to appeal, no notice had been given to the respondent or his solicitor of the appellant's intention to appeal, and that on 4th April, the respondent, in the belief that no further proceedings by way of appeal were to be taken by the appellant, left the State for America, without any definite intention of returning. It appeared also that the appellant had been represented at the taxation of costs referred to in the above-mentioned affidavit.

On behalf of the appellant, affidavits were filed in explanation of the delay, from which it appeared that, in the interval, correspondence had been passing between the Crown Solicitor and the head of the Commonwealth department, on the question of the advisability of appealing.

Sir Julian Salomons, K.C., and *J. L. Campbell*, for the respondent. The appellant was not entitled to special leave to appeal. The prosecution was under sec. 245 of the *Customs Act*, the prosecutor having abandoned the excess in order to give the magistrate jurisdiction. From the decision of the magistrate there is an appeal to the Supreme Court only, by sec. 248. The judgment of the Supreme Court, on appeal, is "final and conclusive"; *Justices Act*, 1902, sec. 106. The prosecutor could, if he had chosen, have gone to the High Court, in the first instance, but, having chosen to go to the Court of summary jurisdiction, he should not be granted leave to appeal from the Supreme Court.

This is not a matter of importance, and there is no important general question of law involved. The amount in question is only £25. The question decided by the Full Court was only

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whether the declaration made by the respondent was true or not; *Canada Central Railway Co.* v. *Murray and others*, 8 App. Cas., 574. The appellant, in his application for special leave, did not disclose certain matters that might have influenced the Court in deciding whether to grant or refuse leave; *Baudains* v. *Liquidators of Jersey Banking Co.*, 13 App. Cas., 832. There is nothing in the nature of the case, either as to the facts or the questions of law involved, that would justify the Court in granting special leave to appeal, under the rule laid down in *Prince* v. *Gagnon*, 8 App. Cas., 103, at p. 105, and adopted in *Hannah* v. *Dalgarno*, *ante* p. 1. If the appellant wishes to raise the question of law he can do so by suing for the duty. The appellant, by allowing the costs of the rule absolute for prohibition to be taxed, and appearing on the taxation, has perempted his appeal. He has taken a step in the action, leading the respondent to believe that he acquiesced in the judgment of the Supreme Court; *Safford and Wheeler, P.C. Practice*, p. 910. No intimation was given to the respondent that the appellant intended to appeal, until the notice of the order granting special leave was served, on 12th April. In that the grounds of appeal were not stated; *Safford and Wheeler, P.C. Practice*, p. 733. The Court will not, in the exercise of its discretion, allow the appellant to appeal now. The appearance of counsel who had represented a party at an earlier stage of the case, to agree to a final decree, was held to perempt an appeal by that party against an earlier decree; *The Ship Clifton*, 3 Knapp., 375. [On this point he cited also *Lloyd* v. *Clark*, 3 Hag. Ecc. Rep., 481; *R.* v. *Joze Alves Dias*, 6 Moo. P.C., 102.]

J. L. Campbell followed. The appellant was not compelled to attend on taxation without protest, and therefore his attendance is a strong indication of acquiescence; *The Brunhilda*, 45 L.T.R., 389, at 392.

If the Court has not sufficient doubt as to the questions of law and fact involved, it will not grant leave to appeal: *La Cité de Montreal* v. *Les Ecclésiastiques du Seminaire de S. Sulpice de Montréal*, 14 App. Cas., 660; however important those questions may be. Here the main question was one of fact, and the question of law was merely incidental.

Wade and *Ferguson*, for the appellant. The question before the Supreme Court was whether, in construing sec. 154 of the *Customs Act* 1901, as to "fair market value," the rule laid down in sec. 144 should be applied, that is to say whether the value for duty was the value of the ingredients in the market of export, or their value when made up as a completed preparation, under the trade name. The value of the completed preparation in this case is many times greater than that of the ingredients, and consequently a very large amount of duty is involved. This is a question of law of great importance to the customs of the Commonwealth, because very large quantities of goods of this description are imported. It not only affects the revenue, but is of great importance to the mercantile community in general.

Delay is not, in itself, a ground for rescission. It must be shown that the respondent has been prejudiced thereby. In this case there has been no prejudice caused; *St. Louis* v. *St. Louis*, 1 Moo. P.C., 144. The appellant could not be expected to know that the respondent intended to leave the state. Moreover, there is nothing to show that he is not still carrying on business here. There is no rule fixing the time within which notice of appeal must be given, and there has been no unreasonable delay here.

[GRIFFITH, C.J., referred to *Cusack* v. *L. & N. W. Railway Company* (1891), 1 Q.B., 347.]

Sir Julian Salomons, K.C., in reply. The offence is alleged to have been committed in 1901. The *Customs Act* was assented to on 3rd October, in that year. The *Tariff Act* was not assented to until 16th December, 1902. The State tariff was, therefore, by the constitution, in force at the date of the alleged offence, and the respondent could not be guilty of the offence charged, because there was no duty on such articles in this State. This is an important constitutional point, and the Court will not, in a case involving so small an amount, decide such a question; *Hannah* v. *Dalgarno* (*supra.*)

Per Curiam.—This is a very important constitutional question, now raised for the first time during the course of the case. The Court therefore is disposed to think that the motion should stand

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over till the hearing of the appeal. This point can then be argued, and the Court can consider it when dealing with the merits of the appeal. We have no doubt as to the competency of the appeal, as a matter of law. The Constitution gives the Court power to entertain appeals from the Supreme Court of any State, subject to such regulations and restrictions as may be prescribed by Parliament. Parliament has not imposed any restriction which would prevent us from hearing it. Under sec. 39 of the *Judiciary Act*, an appeal would lie direct to the High Court in this case. Nor has the Court any doubt that the question of law that is sought to be raised on this appeal is one of importance and of general interest to the mercantile community as well as to the Commonwealth Government. That being so, it is a proper case for granting special leave to appeal. We are also of opinion that the appellant did not, by the mere fact of attending the taxation of costs, estop himself from asking leave to appeal. The only question remaining on the present application was, whether the appellant's delay in applying for special leave is a sufficient bar. But now another point has been raised on behalf of the respondent, upon which the Court is not disposed to express an opinion at present. The application will therefore stand over until the hearing of the appeal. The question of costs of the motion will be reserved.

On 28th June, the appeal came on for hearing.

Sir Julian Salomons, K.C. (*J. L. Campbell* and *Mitchell* with him), for the respondent. The respondent was guilty of no offence. It was admitted that the "fair market value" of the goods was as stated in the declaration in the ordinary sense of the words and in the sense in which they are used in sec. 154 of the *Customs Act*, but it was contended that, by virtue of sec. 144, the value of the particular class of goods referred to in the declaration, *i.e.*, proprietary medicines in bulk, should have been calculated upon an artificial basis, as prescribed in that section. The alleged offence was committed on 16th October, 1901, twelve days after the passing of the *Customs Act*, and nearly a year before the passing of the *Tariff Act*, 16th September, 1902. Under the *Customs Act* no duties could be collected, because there was no tariff in

force except the State tariffs. In New South Wales there was no duty on these articles, and therefore, as sec. 144 only prescribed a method of valuing "for duty," the truth or untruth of the respondent's declaration could not be affected by that section. The declaration was true when made, and at the time of making it the respondent was guilty of no offence. The *Tariff Act* 1902, by secs. 4, 5, and 6, purports to throw back the time of the imposition of uniform duties to 8th October, 1901, as if the Act had been passed on that day, imposing the duties retrospectively, and validating the collection of duties under the tariff proposals before the passing of the Act. Even if Parliament had power to impose the duties, and validate their collection, retrospectively, it cannot by subsequent legislation make an act unlawful which was lawful when done. There is no express prohibition of such legislation in our Constitution, as there is in that of the United States, but a prohibition is not necessary, because the Parliament has no powers beyond those conferred upon it by the Act of the Imperial Parliament. [As to the power of Parliament to pass retrospective legislation, he cited *Stephenson* v. *The Queen*, (Vict.), 2 W. W. & A'B. (L.), 143; *Blac. Com.*, p. 46, on "*Ex post facto* laws."]

But, even if Parliament had the power to create offences retrospectively, it has not attempted to do so here. The *Tariff Act* does not purport to make illegal anything previously done; it merely deals with the collection of duties of customs, and therefore cannot have any effect beyond.

[GRIFFITH, C.J.—You urge this partly as a ground for rescinding the leave to appeal, and partly as a ground for resisting the appeal.]

Yes, and further, the Court will not grant leave to appeal where criminal matters are involved, especially where, as in this case, there has been such delay, and the respondent, on the assumption that the matter was finally disposed of, has left the country; *R.* v. *Mookerjee*, 1 Moo. P.C. (N.S.), 272; *Falkland Islands* v. *R.* (*ibid.*), 299; *Levien* v. *R.*, 13 W.R., 159.

Wise, K.C., and *Wade*, for the appellant. It is not contended that the *Tariff Act* creates the offence retrospectively. The making of an untrue statement in a declaration is an offence by

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virtue of sec. 234 of the *Customs Act*, even though no duty was then leviable. The amount of duty is immaterial for the purpose of testing the truth of the declaration. The power of the Parliament to pass any laws relating to the control and collection of customs, appears from secs. 52 (ii.), and 86 of the Constitution.

[BARTON, J.—In sec. 154 of the *Customs Act*, the words used are, "when any duty is imposed according to value." Is that a condition precedent to there being an offence?]

The duties were in existence from 8th October, 1901. Between the 4th and the 8th there were no duties, but on the latter date the *Tariff Act* came into force, by virtue of secs. 4, 5 and 6, which operate retrospectively.

[GRIFFITH, C.J.—We think that, in order to succeed, you must show that the respondent could have been prosecuted the day after the offence, 17th October, 1901.]

It was decided in *Colonial Sugar Refining Co.* v. *Irving* (1903), Q.S.R., 272, that the duties came into operation as from the day on which the proposals were originally laid on the table. Therefore, the passing of the resolution was not necessary to create the offence, the coming of the duties into operation was sufficient to effect that.

[GRIFFITH, C.J.—The *Tariff Act* only made the duties in force from the earlier date, so far as to prevent the recovery back of money paid by way of duty. The question is, what was the law on 17th October, 1901? It must be remembered that the tariffs of the various States were in force at that time.]

It would be absurd to say that the duties were collectable on that day, but that people could, with impunity, evade payment of them by falsehood, notwithstanding the provisions of the *Customs Act*. The falsehood is a mere question of fact, irrespective of the question whether the articles were dutiable, and to what extent. There is no interference with State tariffs. The *Customs Act* does not impose taxation, it merely prescribes a new method of arriving at the value. It is a provision for the collection and control of whatever duties may be legally enforceable. The provisions of Part IV. are applied, not to interfere with the State tariff, but to provide a uniform basis of calculation. The duties may still vary in the different States, but the method of calculation is to be the same for all in the interval between the passing of

the Act and the establishment of the uniform tariff by the Commonwealth Parliament. It is perfectly consistent with sec. 130 that these sections should be applied in the collection of duties under the State tariff. It may be that there were no duties in force under those tariffs, but that would not excuse an importer from compliance with the provisions of an Act which is in force at the time. The government would be entitled under the *Customs Act* to obtain this information from the importer, even if it were merely for the purpose of compiling statistics. If a person makes a false statement, he is guilty of an offence under sec. 234, whatever the consequences of the statement may be as regards the amount of duty, and whether there is a duty enforceable or not.

Even if the respondent's act was not an offence when done, it is within the power of Parliament to make it an offence by subsequent legislation, operating retrospectively; *Powell* v. *Apollo Candle Co. Ltd.*, 4 (N.S.W.) L.R., 161.

[GRIFFITH, C.J.—Perhaps so. Bills of attainder had that effect. But it is not to be assumed that the Legislature has intended to do so, unless the intention is very clearly expressed. Moreover, debts are very different from offences. It may be that, by constitutional usage, Customs Acts have been held to have a retro-active effect as far as the imposition of the duties as a debt is concerned, but not for any other purpose.]

It would be of little use to impose the liability, if the Act imposing it had not also the effect of giving every power necessary to give effect to, or enforce the liability. There is no doubt that the Government has power to collect the duties from the date of the resolution in the Parliament; *Ex parte Wallace & Co.*, 13 N.S.W.L.R., 1; *Maxwell on Interpretation of Statutes*, 3rd ed., p. 309. Unless, therefore, importers can be prosecuted for evasion of the duty, the imposition of the liability to pay it is futile. Here all the ingredients necessary to constitute the offence were present at the date of the declaration, and the *Tariff Act*, coming afterwards, authorized the prosecution of the respondent in respect of that offence.

Sir Julian Salomons, K.C., in reply. If sec. 144 of the *Customs Act* might be applied merely for the purpose of compu-

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tation, or for the compilation of statistics, even where under the State tariff the article was not dutiable, that would amount to making a person liable criminally for an untrue statement on a matter which was quite trivial or immaterial. The value of the goods would be a purely academic question in that case, whereas the sections as to declaration of value, 144 and 154, apply only to the valuation of goods for duty purposes. This was not a ground taken on the application for leave to appeal. The matter was represented to be one involving questions of great importance because of the amount of revenue affected. The appellant should not therefore be allowed to support his appeal on such a ground. The leave should be rescinded, or the appeal dismissed, with costs both of the appeal and of the motion to rescind.

Wade, for the appellant, on the question of costs. The main point raised here was not raised in the Court below. Being unsuccessful on the point there raised, the appellant applied for leave to appeal, and merely mentioned the questions that had been involved up to that stage of the case. The dates and other matters were not material, on the decision of the Supreme Court, which only involved the question whether secs. 144 and 154 were to be read together. The real ground taken by the respondents on the motion to rescind was the delay of the appellant in applying for leave, and the application had been almost disposed of before the constitutional ground was mentioned. The latter is not a ground for rescinding the leave. It is rather, by virtue of its importance, a further reason why the Court should entertain the appeal. The respondent has really failed on his motion to rescind, and should not have his costs even though the appeal fails.

Sir Julian Salomons, K.C., in reply on the question of costs.

GRIFFITH, C.J.—The respondent in this case was charged before a police magistrate, that "on the 16th October, 1901," (an important date), "at Sydney, he did, in a certain declaration then produced, unlawfully make an untrue statement, that is to say, that certain goods therein referred to were of the value of £308 6s. 8d., whereas the said goods were of a greater value, that is to

say, of the value of £9,728 8s. 5d." The statement which was alleged to be untrue was in these words: "I am the owner of the goods mentioned," then followed words describing the goods, "and the value of such goods 'stated as £308 6s. 8d.,' was, to the best of my belief, the fair and real market value at which such goods were ordinarily sold at the time of shipment, in the principal markets of the country whence they were exported, and without any deduction because of the exportation thereof," and so on. Now, in order that the conviction may be good, the offence must have been committed on the day alleged in the information, viz., 16th October, 1901, and, as it was alleged to have been in breach of some statute, there must have been some law in force at that time which the respondent was breaking when he made the declaration. It is necessary, therefore, to see what was the law in force at that time. A few days before the date of the alleged offence, *i.e.*, on 4th October, 1901, the *Commonwealth Customs Act* 1901 came into operation. That Act contained a number of provisions relating to the collection of customs duties, and matters incidental thereto. The particular section under which the information was laid is sec. 234, which provides, amongst other things, that "no person shall make in any declaration or document produced to any officer, any statement which is untrue in any particular," and imposes a penalty for the breach. The allegation is that the respondent committed a breach of this provision by making a false declaration as to the market value of the goods in question. Now, in order to show that the declaration was untrue, it must first be shown that, by virtue of some statute then in force, the fair and real market value of the goods was not £300 odd, as the respondent alleged. There is no doubt that sec. 234 of the *Customs Act* was then in force, and applied to the collection of duties of customs throughout the Commonwealth, although at the same time the State tariffs were in force in the respective States. Under the Constitution the State tariffs remained in force until the imposition of uniform duties of customs throughout the Commonwealth by the Commonwealth Parliament. The Act imposing uniform duties was assented to on 16th September, 1902, nearly a year later, and that Act, by sec. 4, provides that "the time of the imposition of uniform duties of customs is the

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eighth day of October, 1901, at 4 o'clock in the afternoon," &c. Sec. 5 of the same Act 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 . . . . and such duties shall be deemed to have been imposed at such time and dates," &c. Sec. 6 provides that "all duties of customs collected pursuant to any tariff alteration shall be deemed to have been lawfully collected," &c. It is a matter with which we all are acquainted, that, in the interval between the time when the resolutions embodying the tariff were laid upon the table of the Commonwealth Parliament, and the passing of the Act imposing the duties and establishing a uniform tariff, the duties had been collected by the Commonwealth customs officers, in accordance with a very old and well-known constitutional usage. It was assumed that the collection of duties would be valid as from the date on which the resolutions were laid upon the table of Parliament. It has been held in a case in Queensland, *Colonial Sugar Refining Co. Ltd.* v. *Irving*, (1903) Q.S.R., 261, that Parliament had the power to validate the collection of customs duties retrospectively. It is true that that case is now under review by the Privy Council, but, for the purposes of this judgment, it may be assumed that that decision was right, and that the customs officers must be held to have had authority to collect the duties when they did. But, even assuming that Parliament had power to authorize their collection retrospectively, that is to say, to impose them as a debt and to authorize the retention of money paid as duty before the passing of the Act, although the collection was unauthorized at the time when they were collected, it does not follow that it had the power to make unlawful an act which was lawful at the time when it was done, nor does it follow that, if it had that power, it has even attempted to exercise it. There is certainly nothing in the *Tariff Act* to suggest that the Legislature applied its mind to that purpose, and it would require extremely plain language to justify the Court in inferring that it had done so. There is no such language in this case. It is therefore impossible to hold that, if the act of the respondent was lawful under the then existing laws, he could

be afterwards prosecuted in respect of it by virtue of laws passed subsequently. It is not disputed in this case that the statement in the respondents declaration was absolutely true in the sense which the words ordinarily bear, that is, that the fair market value of the goods at the place of export was what the respondent stated it to be. But it is said that, owing to positive enactments contained in the *Customs Act*, which was passed a few days before the declaration was made, the real market value was to be calculated on a different basis altogether, not that suggested by the plain meaning of the words themselves, but at an amount arrived at in accordance with an artificial rule laid down in sec. 144 of the *Customs Act*. That section is one of a series of sections, dealing with duties of customs, contained in Part VIII., under the heading "The Duties." The first section in that part (sec. 130), provides that "This Part of this Act shall not affect any duties payable under any State Act." Now, at that time, the Commonwealth Parliament not yet having passed the Act establishing a uniform tariff, the various State tariffs were in force in the several States. Of course we all know that, from the date of the resolutions being brought forward in the Commonwealth Parliament, the duties were not collected under the State Tariffs, but, as a matter of law, they were technically in force, and this part of the Act expressly declared that it was not to affect any duties payable under any State Act. Now, the only duties payable at that time were those payable under the State Acts, so that this sec. 144, as far as it purported to affect duties payable, did not affect them, and was not part of the law applicable to the then existing state of things. That section laid down an arbitrary rule with regard to the valuation, for the purposes of duty, of proprietary medicines, which are imported in an unfinished state from some other country, and afterwards made up and sold in the Commonwealth. In this particular case the effect of that rule would have been to multiply the value of the goods thirty-fold. The whole case made for the Customs authorities before the magistrates and the Supreme Court was that sec. 144 must be taken as a rule to be applied in the construction of declarations of value by importers. Sec. 154 of the same Act provided that "when any duty was imposed according to value, the value

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should be taken to be the fair market value of the goods in the principal markets of the country whence the same were exported in the usual and ordinary commercial acceptation of the term," and sec. 144 prescribed the particular mode of valuing this particular class of goods. But the express words of sec. 144 are—"shall be valued for duty, and duty shall be paid thereon at the ordinary market value in the country whence imported," &c. It having been expressly provided by sec. 130 that these provisions should not apply to duties payable under any State Act, how can they be read into this declaration for the purpose of making a statement contained in it false, which was true in the ordinary acceptation of the term, and true for the purposes of any law then in force? That would be giving a retrospective punitive operation to the *Tariff Act* of 1902, and it would apply to all the States. In the case of New South Wales, this consideration would be particularly cogent, because the provision relates only to *ad valorem* duties, and at that time there were no *ad valorem* duties in that State, and it was consequently unnecessary to value any goods for duty. Clearly, therefore, the rule contained in sec. 144 had no application to the case of goods imported into New South Wales, and, as a matter of law, that continued to be the state of things until the *Customs Tariff Act* was assented to by the King's representative on 15th September, 1902. The act of the respondent, therefore, having been perfectly lawful at the time when it was done, has not been made unlawful by subsequent Acts of Parliament, and he cannot be prosecuted for what was then lawful, by virtue of Acts passed subsequently. This point, however, was not taken by the respondent before the magistrate, nor before the Supreme Court. The only questions argued before the Court below were whether the provisions of sec. 144 should be held to be incorporated in sec. 154, and the further question whether, the latter section being so qualified, the declaration of the "fair and real market value of the goods in the principal markets of the country whence imported" was to be construed in this view of the law. The learned Judges of the Supreme Court were of opinion that sec. 144 could not be so incorporated, and that the words of sec. 154 should have their fair and natural meaning. It is unnecessary for us to consider that question, though it is a very im-

portant matter, because it affects the collection of duties of customs upon all goods of this class throughout the Commonwealth.

The Supreme Court having so decided, the Commonwealth officers thereupon obtained special leave to appeal to this Court from that decision. A motion was made on various grounds to rescind the order granting special leave. Most of those grounds we have disposed of, but one was left, viz., that the application for special leave was made too late. This Court had certainly been sitting several days before the application was made, but it is clear that the appellant's appeal could not possibly have come on for hearing earlier than it did. Moreover, no rules have been made as to the time within which application should be made for special leave to appeal. The point taken was a very important one, and my brother Judges, to whom the application was made, were of opinion that a case had been made out, and that the point was proper to be determined by this Court. At that stage this was the only question that was in controversy between the parties, and the motion to rescind was not based upon any contention that there was another ground on which the appeal must fail, but on other grounds altogether. After they had been practically disposed of, this point was raised for the first time. It was not taken as a ground of the motion to rescind, at least not until the other grounds had been practically disposed of. If the point had been brought under the notice of the Court on the motion for special leave, it may be doubtful whether the Court would or would not have granted special leave, though possibly they might have thought it an additional ground for granting it. It is unnecessary now to say which view would have prevailed. I am of opinion, and my brothers agree with me, that under the circumstances the delay was not sufficient to form a ground for rescinding the special leave. But, for the reasons already given, we think that the appeal must be dismissed, and with costs. As to the motion to rescind we make no order as to costs.

Appeal dismissed with costs.

Solicitor for appellant, *The Crown Solicitor of New South Wales.*
Solicitor for respondent, *Mark Mitchell.*