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LEVER BROS. v. G. MOWLING & SON.

Isaacs J.

BARTON J. I am of the same opinion and do not think it necessary to add anything. I think the opposition was groundless and that this appeal also is groundless.

ISAACS J. I concur in the judgment of the Court. I think that, assuming as we must that the respondents' label will be fairly used, there is no reasonable probability of there being deception.

HIGGINS J. I concur.

Appeal dismissed with costs.

Solicitor, for the appellants, *E. Hart* for *A. De Lissa*, Sydney.
Solicitors, for the respondents, *Braham & Pirani.*

B. L.

Foll *Murphy v Farmer* 79 ALR 1 | Foll *Murphy v Farmer* (1988) 62 ALJR 420 | Foll *Hill v Donohoe* (1911) 13 CLR 224 | Dist *Poole v Wah Min Chan* (1947) 75 CLR 218

[HIGH COURT OF AUSTRALIA.]

LYONS . . . . . APPELLANT;
DEFENDANT,

AND

SMART . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF VICTORIA.

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MELBOURNE, *May* 28, 22. *June* 1, 2, 11.

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

Customs Act 1901 (*No.* 6 *of* 1901), *secs.* 229, 233—*Unlawful possession of goods—Unlawful importation—Possession unconnected with importation—Knowledge—Prohibited imports.*

Sec. 233 of the *Customs Act* 1901 does not impose a penalty on a person who is in possession of goods which have been unlawfuly imported, but who was in no way connected with their importation, although he knows that they have been so imported.

So held by the Court (*Isaacs J.* dissenting).

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Quære, whether prohibited imports are goods unlawfully imported within sec. 233.

APPEAL from a Court of Petty Sessions of Victoria.

At the Court of Petty Sessions at Melbourne an information was heard whereby John Mitchell Christie, Inspector of Customs at Melbourne, for and on behalf of the Collector of Customs for Victoria, Archibald William Smart, charged that Solomon Meyer Lyons, on 30th December 1907, at Melbourne did unlawfully have in his possession certain goods, namely, certain prohibited imports within the meaning of the *Customs Act* 1901, to wit, certain figures the same being indecent articles within the meaning of the said Act, contrary to such Act. The information was heard before P. J. Dwyer, Esq., Police Magistrate.

From the evidence it appeared that the defendant carried on business at a fancy goods shop in Elizabeth Street, Melbourne, where the articles in question were seized; that some of the articles, viz., certain ash trays, had been purchased in Sydney in the open market, and others, viz., certain china figures, in Melbourne in the open market, and others had been sent to the defendant to decide whether he would buy them.

The Police Magistrate in giving his decision said:—"I find that the trays were bought in Sydney. Defendant had nothing to do with the importation of any of the articles. I find that on the Saturday afternoon previous to the seizure defendant got the case of goods" (in which certain of the articles were found) "into his possession, and that they had been imported by the Small Arms Company. I am not satisfied that he was not aware of the contents. I think he was aware, because when the officer came in he knew what was required, and he produced it quickly from the box. I do not say that he had anything to do with the importation of these things into the State. I find that they are indecent, and of an offensive and beastly character within the meaning of secs. 50 and 52 (*c*) of the *Customs Act* 1901."

The defendant was convicted and fined £30. From this conviction the defendant now appealed by way of order to review to the High Court, the order *nisi* having been obtained on the grounds:—

1. That upon the true construction of sec. 233 of the *Customs Act* 1901, on the evidence and finding no offence was proved.

2. That if upon the true construction of such section and upon such facts and findings an offence purports to be created, such section is in excess of the powers of the federal Parliament.

Mitchell K.C. (with him *Bevan*), for the appellant. A person who has in his possession goods which he knows to have been unlawfully imported is not guilty of an offence under sec. 233 of the *Customs Act* 1901 unless his possession was connected with the importation. The word "unlawfully" in that section means contrary to the provisions of some federal Statute. See *Irving* v. *Nishimura* (1). The mere possession of goods which have been unlawfully imported is not contrary to the provisions of any federal Statute. Sec. 229 authorizes the forfeiture of goods unlawfully imported, but it goes no further.

[ISAACS J.—Goods unlawfully imported ought not to be in Australia at all. The appellant knew that these goods were unlawfully imported. Is not his possession unlawful? By sec. 229 the property is divested from him and passes to the Crown: *The Annandale* (2). See also *M'Lane* v. *United States* (3)].

Knowledge is not conclusive as to unlawfulness. Although goods unlawfully imported are declared by sec. 229 to be forfeited, the title of the Crown to the goods is not consummated until seizure or condemnation of the goods, although it then dates back to the time the offence was committed. Possession of the goods before seizure or condemnation is not unlawful, and the owner may maintain his possession against any person other than the Crown.

[HIGGINS J. referred to *R.* v. *Sleep* (4).

ISAACS J. referred to *Attorney-General* v. *Siddon* (5); *Keck* v. *United States* (6).

O'CONNOR J. referred to *Cowan* v. *Milbourn* (7).]

Prohibited goods are not included in the term goods unlawfully imported. This is borne out by sec. 229 (*a*) and (*b*).

(1) 5 C.L.R., 233, at p. 238.
(2) 2 P.D., 218.
(3) 6 Pet., 404.
(4) 30 L.J.M.C., 170.
(5) 1 Cr. & J., 220.
(6) 172 U.S. 434, at p. 451.
(7) L.R. 2 Ex., 230.

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[Counsel also referred to *United States* v. *1960 Bags of Coffee* (1); *Wollaston's Customs Law*, p. 157.]

McArthur and Macfarlan, for the respondent. Sec. 233 should, so far as unlawful possession is concerned, be read "no person shall in contravention of the express or implied provisions of federal law knowingly have in his possession any imported goods." That prohibition may be and is in sec. 233 itself. There is also an implied prohibition against possession in the prohibition against importation. If it is unlawful to bring certain goods into the Commonwealth, possession of them in the Commonwealth must necessarily be unlawful.

[ISAACS J. referred to *United States* v. *Kee Ho* (2).]

It is found that the appellant knew that the articles were indecent and had been imported, so that he knew they were prohibited imports, and should not have been in the Commonwealth. A section of an Act very often makes the unlawful doing of a certain act punishable although by no other section is the doing of that act made unlawful: cf. *Crimes Act* 1890 (Vict.), secs. 83, 84, 270, 271. Although in sec. 229 of the *Customs Act* 1901 prohibited imports are placed in a different category from that in which goods unlawfully imported are placed, no distinction between them is intended, but the separation is only made because it was desired to make an exception in regard to prohibited imports.

[Counsel also referred to *Fisher* v. *Bridges* (3).]

Mitchell K.C., in reply, referred to *Wollaston's Customs Law*, p. 170; *Davenport* v. *The Queen* (4).

[ISAACS J. referred to *Stockwell* v. *United States* (5); *Harford* v. *United States* (6).

O'CONNOR J. referred to *R.* v. *Clarence* (7).]

Cur. adv. vult.

GRIFFITH C.J. The question for determination in this case is purely a question of verbal construction. It arises under the

(1) 8 Cranch., 398
(2) 33 Fed. Rep., 333.
(3) 3 El. & Bl., 642; 23 L.J.Q.B., 276.
(4) 3 App. Cas., 115.
(5) 13 Wall., 531, at p. 546.
(6) 8 Cranch., 109.
(7) 22 Q.B.D., 23.

Customs Act 1901, which contains general regulations as to the importation of goods into Australia. The Act was passed in execution of what is called the trade and commerce power—the power to regulate trade and commerce with external countries—and in an Act of that nature, the legislature *primâ facie*, addresses its mind to that subject, that is to say, the importation or introduction of goods into the Commonwealth— bringing them into the Commonwealth. The legislature does not concern itself with the regulation of the internal affairs of the States in such an Act. Indeed, any attempt to do so by means not merely incidental to the regulation of importation would be *ultra vires*.

The Act should therefore be construed, where general words are used which, taken literally, are capable of including matters which are *ultra vires*, as having been intended to refer to those only which are *intra vires*. *Primâ facie*, the Act is only dealing with importation and matters incidental to it.

The charge brought against the appellant was that on the 30th December he unlawfully had in his possession certain goods, namely, certain prohibited imports. That charge was founded upon sec. 233 of the *Customs Act* 1901 which is as follows:—"No person shall smuggle or unlawfully import, export, convey or have in his possession any goods and no master of a ship or boat shall use or suffer his ship or boat to be used in smuggling or in the unlawful importation, exportation, or conveyance of any goods."

That section *ex facie* deals with transactions or operations of import or export. The words material to the present case are "have in his possession." To complete the sentence of which those words form part the word "unlawfully" must be read into them—"no person shall unlawfully have in his possession any goods." Now, the word "unlawfully" is a word commonly used in Statutes creating crimes, misdemeanours and minor offences, and in such Acts it is used in two shades of meaning, one when referring to an act which is wrong or wicked in itself—recognized by everybody as wicked—as, for instance, when it is used with reference to certain sexual offences, or with reference to acts which are absolutely prohibited under all circumstances; the other when referring to some prohibition of positive law. The

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Customs Act 1901 has nothing to do with what is right or wrong or virtuous. It contains certain arbitrary rules which the legislature lays down. What is wrong is wrong because the Act says so, and for no other reason. The word "unlawfully" must, therefore, there being no other relevant law, be read in that context as meaning "in contravention of the provisions of this Act."

But some further expansion is still necessary in order to limit the enactment to matters *intra vires* the federal Parliament. Before dealing with that expansion I should point out that the charge assumes that prohibited goods are goods unlawfully imported within the meaning of sec. 233. I entertain, however, very great doubt upon that point. The initial words are "No person shall smuggle or unlawfully import, export, convey or have in his possession any goods." On reference to sec. 229 it is seen to contain a list of goods which are to be forfeited to His Majesty. The first category is "All goods which are smuggled, or unlawfully imported, exported, or conveyed"—the very words used again in sec. 233. The second category is "All goods imported which are prohibited imports excepting," &c.; indicating, according to the *primâ facie* rules of construction, two distinct classes of things, with one of which sec. 233 deals and with the other of which it does not deal. The words "All goods imported which are prohibited imports" refer to sec. 52, which contains a category of prohibited imports, and it is necessary to refer to the nature of those imports to show what the legislature was dealing with. They are things of various classes. Some might be called *mala in se* by some persons, while others might think otherwise. The first is copyrighted works, which are works which are copyrighted in the King's Dominions, "and of the existence of which copyright and date of its expiration written notice has been given to the Minister by or on behalf of the proprietor of the copyright," unless the reproduction has been with the permission of the proprietor of the copyright. That is evidently a matter to be ascertained in some way or other at the place and time of importation. The second class is "false money and counterfeit sterling and any coin or money of the King's Dominions not being of the established standard in weight or fineness." The third is "blasphemous

indecent or obscene works or articles." The fourth is "goods manufactured or produced wholly or in part by prison labour or which have been made within or in connection with any prison, gaol, or penitentiary." I remark as to the first class that it might be very hard to know whether the permission of the proprietor of the copyright had been obtained. As to the second, the money might or might not appear on its face to be prohibited —in the case of a light sovereign the victim might not know that it was light. In the case of blasphemous articles they might be such that their character might not be apparent on their face. Indeed I take it that there are as many opinions as to what is blasphemous as there are men—*quot homines tot sententiæ*. As to goods manufactured by prison labour, they do not bear on their face any distinct mark to show whether they come under that description or not. The fifth class is "exhausted tea, and tea adulterated with spurious leaf or with exhausted leaves, or being unfit for human use, or unwholesome." According to the construction contended for on behalf of the respondent, any victim who buys exhausted tea is liable to a penalty of £100. The sixth class is "oleomargarine butterine or any similar substitute for butter unless coloured and branded as prescribed." The seventh is "all goods the importation of which may be prohibited by proclamation." The eighth is "all goods having thereon or therewith any false suggestion of any warranty guarantee or concern in the production or quality thereof by any persons public officials Government or country." And the ninth is "mineral oil and mineral spirits unless imported under and subject to such restrictions as may be declared by proclamation." By sec. 50 it is enacted that "no prohibited imports shall be imported," with a penalty of £100. Now, having regard to some of the things mentioned in sec. 52, it would seem to be improbable on the face of it that the legislature should say that any person who should have in his possession any of these goods at any period after their importation should be liable to a penalty of £100. They are things which might have come into his possession innocently, without any knowledge that there was a contravention of the law, and therefore it is improbable that the legislature would have passed such an Act. It is something like the legislature enacting

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that any person unlawfully having in his possession goods liable to forfeiture should be liable to a penalty of £100. Such a provision would be perfectly intelligible, but I think one would not expect to find such an enactment in the Statute Book.

In *Irving* v. *Nishimura* (1) it was assumed that the words "unlawfully imported" included prohibited imports, but the point was not argued. In that case the defendant was himself concerned in the importation of the goods in question. I do not think that that case can be regarded as an authority on the point.

But, though there is, for these reasons, some difficulty in holding that prohibited imports are included in the words "unlawfully imported," on the other hand there are very serious difficulties involved in holding the contrary. I desire, therefore, to keep my mind open on the point until a case arises in which it is necessary to decide it.

I will assume, then, that the words "unlawfully have in his possession any goods" in sec. 233 apply to prohibited imports. The words must then be expanded to read thus—"unlawfully have in his possession any goods unlawfully imported" including in that term prohibited imports, and "unlawfully" meaning "in contravention of this Act." The term "unlawfully" must include "knowingly:" *R.* v. *Sleep* (2). Now, there is no express prohibition to be found, except in sec. 233 itself, against having in possession goods unlawfully imported. There may, however, be cases in which possession is obtained in the course of some transaction in direct violation of an express prohibition of the Act, and in such a case there would, no doubt, be unlawful possession.

I think the word "import" in sec. 233 means "bring into the Commonwealth," and refers to some contravention of the Act committed in the act of bringing in, and not to a contravention committed after the goods have been reported to the Customs. The term "import," therefore, includes any case in which goods are brought into the country without entry at the Customs or at a forbidden place, and—on the assumption already made—includes prohibited imports. But the reason why the importation is unlawful is quite immaterial: it does not matter whether the

(1) 5 C.L.R., 233.

(2) 30 L.J.M.C., 170.

goods are dutiable, or free, or prohibited. The question is whether the importation is unlawful.

The first question which suggests itself from this point of view is whether sec. 233 is directed to acts done at the time of, or in connection with, the operation of the bringing in, or whether it applies also to goods which, after the operation of bringing in is concluded, come into the possession of any person, whether he himself was or was not concerned in the operation. In the first view the words "being" or "in course of being" would be read as inserted before the words "unlawfully imported." In the second view the words "which have been" would be so read. In support of the first view it may be pointed out that, in the case of goods unlawfully exported, that is the only construction which will make the words applicable to any possible state of facts. This is almost, if not quite, as clear in the case of goods unlawfully conveyed. It is not so obvious in the case of smuggled goods. In the second view the word "unlawfully" means "knowing that the goods would not have come into his possession unless some other person had contravened the Act," that is to say, "unlawfully" means "knowingly" *simpliciter*. I am not aware of any instance where the word "unlawfully" has been so construed, except where the thing or act referred to is in its nature wrong, or is positively wicked, or prohibited by some positive law. So construed, the section would apply to the case of any goods as to which the man who has them in his possession receives the information that they have been unlawfully imported. He may have acquired possession of the goods in perfect innocence. He is at least entitled to inquire whether the information is true. How long a time is to be allowed him to verify the statement? If he finds it is true, what is he to do with the goods? They are liable to forfeiture. Is he to inform the Customs authorities, and offer to give them up? But that would not save him, for, *ex hypothesi*, his possession of the goods has become unlawful. The goods may be light sovereigns which he received in ordinary business, or foreign prison made furniture which he has bought in ordinary trade, or goods which have in fact been landed elsewhere than at a wharf and on which Customs duties have

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in fact been paid. I find it very difficult to hold that this is the meaning of the words "unlawfully have in his possession."

Another suggested construction on the second view is that "unlawfully" means "knowing at the moment of acquisition that the goods have been unlawfully imported." It is not an uncommon provision of Customs Acts to enact that a person who acquires possession of any uncustomed or prohibited goods, knowing of their character, shall be liable to a penalty. But it is usual to find express provision to that effect. Are then the words of sec. 233 equivalent to such a provision? It is true that the concept of acquisition connotes that of possession, and the concept of possession connotes that of acquisition. But the two concepts are no more identical than cause and necessary effect are identical concepts. One cannot be conceived of without the other; that is all. Are we then justified in saying that, although the legislature could not have intended in all cases to punish the effect—that is, the mere possession—although originally innocent, they meant to distinguish between different cases equally falling within the general words, so that those general words should be construed as applying only to one class of cases, as to which it is not unlikely that the legislature would have made provision if their attention had been directed to the matter, namely, cases in which the effect—*i.e.*, possession—is differentiated from others by circumstances contemporaneous with the cause—*i.e.*, acquisition? I can see no warrant for cutting down the general provisions in that way or for making such a selection which the legislature themselves have not made. Nor have we any right to say that, where the legislature said "have possession," they meant "acquire possession."

A third construction is then suggested, viz., that, in the case, at any rate, of prohibited goods, possession becomes unlawful as soon as the fact that they were prohibited goods becomes known to the possessor. But the classes of prohibited goods are various. If they all bore upon their face the mark of illegality, more might be said for this argument. Of the classes enumerated in sec. 52 some may be said to bear marks of illegality on their face; others do not. As I have already pointed out, all these provisions *primâ facie* refer to the time of importation and not

to a later time, and I referred to the cases of light sovereigns and prison-made furniture—things which are not *ex facie* illicit, such as are dies for printing postage stamps, the unauthorized possession of which is absolutely prohibited by the Postal Acts. But, it is said, there is a distinction between goods which are *ex facie* illicit, like the articles in question in this case, and other goods. This argument seems to me to involve a double fallacy; first, that the same words in a general enactment may have different meanings according to the subject matter to which they are sought to be applied, and, secondly, that the word "unlawfully" in sec. 233 sometimes means wrongly in the sense of a contravention of generally accepted notions of right and wrong, and sometimes means in contravention of the provisions of the Act. The *Customs Act* has nothing to say to things *mala in se*, It imposes arbitrary rules which must not be contravened. The only test of right or wrong is whether there has been a contravention of those rules. All goods unlawfully imported are placed on the same footing whatever the previous contravention may have been. According to this construction the words "unlawfully have in his possession" would, as desired, bear one or other of the following meanings:—As to some goods, "have in his possession knowing at the time of acquisition that the goods have been imported in contravention of the law"; as to others, including some or all prohibited goods, "have in his possession knowing at any time after acquisition that the goods have been unlawfully imported"; as to others, "have in his possession with that knowledge and knowing further that the goods are such that no one should have them in his possession." I am unable, without disregarding ordinary canons of construction, to find any warrant for so expanding and construing the simple phrase used in sec. 233. Such a construction is really founded upon conjecture, more or less plausible, but itself founded upon an *a priori* assumption of what the legislature must have intended, which is worse than conjecture. The steps in this argument are these:—First, this is an act which ought to be prohibited. Secondly, the legislature must have intended to punish it. Thirdly, they must have done so. All that remains

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is to find some phrase in the Act capable of the desired construction, the possibility of a *casus omissus* being rejected.

For these reasons I am led to the conclusion that sec. 233 was not intended to apply to the case of unlawfully imported goods which, after the operation of importation is concluded, are in the possession of a person who was himself not in any way connected with their importation. The appellant was such a person. I think, therefore, that the appeal must be allowed.

BARTON J. The Constitution by sec. 52 (ii.) gives the federal Parliament exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to "Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth." The *Customs Act* 1901 was passed in pursuance of that power, and in some respects it is also referable to the power of taxation, and to the power to regulate trade and commerce with other countries. Now, looking at sec. 233 of the *Customs Act* 1901, we have to give a meaning to one particular portion of the following words:—"No person shall smuggle or unlawfully import, export, convey or have in his possession any goods." The *prima facie* meaning of those words would be to make it an offence for a person to have in his possession unlawfully any goods. Obviously that cannot be the meaning of the words, because there is no power under the Constitution for the federal Parliament to usurp the general law-making power of the States in criminal matters. The federal Parliament has only power to make such criminal laws as may give a sanction to the execution of Statutes which it has power to pass. Consequently a literal reading of those words would place them beyond the legislative powers of the Commonwealth, and would defeat the operation of the Act altogether. But, of course, that is not a construction which the Court would adopt, because it is well known that the Court will lean to such a construction as will bring the Statute within the power of the legislature whose act is in question.

That being so, what, within the limits of the legislative power of the Commonwealth, is the construction to be placed on those

words? It cannot be disputed that the federal Parliament has power to pass legislation ancillary to the due execution of Customs laws; but another question remains behind, and it is this:—In interpreting a penal law, where the words used are wide and large, are we to arrive at a meaning which makes a crime by construction, or is the reasonable interpretation of words, which in their essence are somewhat ambiguous, to be that which allies the act sought to be punished most closely to the purpose of the legislation? It is obvious that the latter course is that which the Court should adopt. The words then are these:—We have a prohibition of "smuggling," and that is defined in the Statute as meaning "any importation or introduction or attempted importation or introduction of goods with intent to defraud the revenue" (sec. 4). As the essence of the act is the intent to defraud the revenue, there is no need to place the word "unlawfully" before "smuggling." The remaining words of the section are, "or unlawfully, import, export, convey or have in his possession any goods." It is plain that the word "unlawfully" must qualify not only the words "import, export, convey" but also the words "have in his possession," and possession, therefore, like importation, exportation and conveyance, must be unlawful. I take "unlawfully" in this connection to be, as urged by Mr. *Mitchell* in arguing the case, unlawfully in the sense of contravention of a federal law. Now, there is no other federal law that applies to the occasion except this law, so that "unlawfully" means "in contravention of this *Customs Act*." As *Stephen* J. said in *R.* v. *Clarence* (1) an unlawful act in its ordinary meaning is an act which is "forbidden by some definite law," and that is undoubtedly the sense in which the word "unlawfully" is used in sec. 233.

That being so, and it being clear that the thing aimed at is not the mere fact of unlawful possession of goods, we must look further. What does "any goods" mean? It cannot mean "any goods whatever," because then we should be landed in a transgression or overstepping of the legislative power of the Commonwealth. Does it mean "any goods unlawfully imported, exported, or conveyed?" If that were so, then mere innocent possession would be penal. The Court will not make such an intendment

(1) 22 Q.B.D., 23, at p. 41.

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as that unless it is seen, from the terms employed or from the absolute necessity of the subject matter, that it must have been the intention of Parliament to punish persons irrespective of guilty mind. Then what guilty mind is to be presumed in the construction of the enactment? We cannot rely on conjecture, nor make an offence by construction. We must limit the words, and the meaning most consistent with the purpose of the Act, the words being penal, must be that which we must give to them. Now, we know what is the meaning of "import" and of "export," and the word "convey" is a word employed very frequently in Imperial and American legislation for the purpose of designating the introduction of goods into, or the taking of goods out of, a country. Suppose "convey" is not used in that sense. We have the words "import," "export," and "convey." Can "convey" mean more than convey during the act of importation or exportation, or for the purpose of such importation or exportation? According to the principles I have endeavoured to lay down, I think that is the widest meaning we can properly give to it. Now looking at the words "have in his possession" in that collocation, it seems to me those words are used in a similar sense to the others, that is to say, the expression "have in his possession" means "have in his possession in the act or for the purpose of importation or exportation," and, for the reasons I have already given, it must mean "knowingly have in his possession."

The evidence shows that in this case the goods were bought in the open market. They had become part of the ordinary mass of property in the country. They were no longer in the course of importation. That preliminary stage was over, and, unless we by mere inference or construction say that this section affects goods when the act of importation is over—unless we are prepared to go that length—we cannot say on the evidence that this section clearly implicates the appellant in a penal offence. If we look at the remainder of the section, "no master of a ship or boat shall use or suffer his ship or boat to be used in smuggling or in the unlawful importation, exportation, or conveyance of any goods," that branch of the section throws some light on the meaning of the words "have in his possession." The conveyance of goods by way of importation or exportation

must ordinarily be from or to a ship or boat, and therefore the master is prohibited from using his ship or boat in conveying goods for any such purpose. If that is the meaning of conveyance in that connection, further light is thrown upon the meaning of "have in his possession," guiding us to the conclusion that in construing this penal section the words "have in his possession" must be accorded a meaning which has some relation to the act of importation or exportation, or, in the sense in which I have used it, the act of conveyance.

I think that I may well refer to some words which I cited in *Scott* v. *Cawsey* (1) from the judgment of the Judicial Committee of the Privy Council in *Dyke* v. *Elliot*; *The Gauntlet* (2):—"'No doubt all penal Statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip or a *casus omissus*, that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of.'" That is a distinct intimation from the authority which binds us as to the sense in which we are to construe a penal Act. I then went on to say:—"To my thinking, the plain meaning of the words does not render the appellant liable. But if I had any real doubt as to them, I should be guided by the very plain sense of the words of Lord *Esher*, then *Brett* J., when in *Dickenson* v. *Fletcher* (3), he said:—'Those who contend that a penalty may be inflicted, must show that the words of the Act distinctly enact that it shall be incurred under the present circumstances. They must fail, if the words are merely equally capable of a construction that would, and one that would not, inflict the penalty.' It is as true now as when *Blackstone* wrote it, that 'The law of England does not allow of offences by construction.'" To these expressive authorities I may add, for the sake of the clear way in which it is put, a quotation from the American case of *United States* v. *Lacher* (4). The words are those of *Fuller* C.J. delivering the opinion of the Court. He said:—"As contended on behalf of the defendant, there can be

(1) 5 C.L.R., 132, at p. 145.
(2) L.R. 4 P.C., 184, at p. 191.
(3) L.R. 9 C.P., 1, at p. 7.
(4) 134 U.S., 624, at p. 628.

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no constructive offences, and before a man can be punished, his case must be plainly and unmistakably within the Statute. But though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal as well as other Statutes, and they are not to be construed so strictly as to defeat the obvious intention of the legislature." Can we, sitting here as a Court, whose duty it is not to give greater force to the language of the legislature than it will clearly bear, say that the purchase of goods which have become part of the common stock of those goods in the country, even if bought with the knowledge that they have been unlawfully imported, was the thing aimed at by these words? My conclusion is clear that nothing of the kind was intended. If I had to put a signification upon the words—it being enough to say that they do not apply to such a case as I have just mentioned—I should say that the words "have in his possession"—and I apply this to the word "convey" also—mean "have in his possession knowingly any goods in the process or for the purpose of importation or exportation."

I have not referred to another question, the subject of much argument in this case, that is, whether prohibited imports were intended to be placed in the same category as goods unlawfully imported, or were dealt with separately. In sec. 229 we find a very large number of classes of goods are to be forfeited to His Majesty. The first class is "all goods which are smuggled, or unlawfully imported, exported, or conveyed." That clearly has application for the purposes of sec. 239. The second class is "all goods imported which are prohibited imports," &c. It has been contended that, because there is a possibility of knowledge being essential to the offences of unlawfully importing, exporting or conveying, prohibited imports are placed in a separate sub-section only because it was necessary to distinguish them, as it is contended that the mere possession of prohibited imports is unlawful and renders them forfeitable. But supposing that were so, the legislature, instead of dividing these things into two classes, and specifically separating them one from another, could have achieved its purpose by merely adding two or three words to sub-section (*a*) of sec. 229. If there was a reason for placing prohibited imports and goods unlawfully imported in separate sub-sections, and we

must presume that there was a reason, it was probably for the purpose of showing that they are distinct in kind and distinct in meaning. I am inclined to think there is such a distinction as makes it, I will not say clear, but strongly arguable, that prohibited goods, having already been dealt with in sec. 50 so far as making their importation an offence is concerned, are not included in the offences dealt with in sec. 233; but for the purpose of my judgment in this case it is not necessary to hold that prohibited goods are not included in the term unlawfully imported goods, and that question may be left open until a specific case arises calling for its determination.

I do not follow the arguments through the many sections of the Statute—some of which point in one direction and some in another. It is sufficient to base my judgment on the broad principles I have endeavoured to express, and, holding to those principles, I am of opinion that the appeal should be allowed and the conviction quashed. I will conclude with the words of *Bramwell* B. in *Cowan* v. *Milbourn* (1):—"It is strange there should be so much difficulty in making it understood that a thing may be unlawful, in the sense that the law will not aid it, and yet that the law will not immediately punish it."

O'CONNOR J. read the following judgment. I take it to be established that the articles referred to in the information are "indecent" within the meaning of sec. 52 of the *Customs Act* 1901, and therefore "prohibited imports," and, although there is nothing to show whether the appellant knew what the goods were when he acquired them, that he was in possession of them on the date charged in the information with full knowledge of their nature. The matter for decision is was he, on the true interpretation of sec. 233 of the *Customs Act* 1901, guilty of an offence?

The concise wording of the section makes it necessary in considering its meaning to supply the word "unlawfully" before the word "have" and after the word "goods" in the second line. The former must be supplied in accordance with the ordinary rule of grammatical construction; the latter is necessary to cut

(1) L.R. 2 Ex., 230, at p. 236.

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down the generality of the expression "any goods" which, it is clear from the context, must be restricted to goods unlawfully handled in the different ways enumerated by the rest of the section. The portion material in this case would then read thus: "No person shall . . . unlawfully have in his possession any goods smuggled or unlawfully imported, exported or conveyed." "Penalty one hundred pounds."

The appellant puts his case on two grounds. First, that the expression "unlawfully imported" does not include the importation of "prohibited goods" and therefore the section does not apply. Secondly, that the possession of prohibited goods in the circumstances proved in this case is not made an offence.

The first ground raises a question difficult and of an importance that extends beyond the interpretation of this one section. Upon that it is unnecessary to express an opinion as I base my judgment upon the second ground.

It being established that the appellant had in his possession "prohibited goods" with the knowledge that they were so, it is incumbent on the prosecution to show that the appellant's possession was an "unlawful possession" within the meaning of the section. In other words it is the "unlawful" possession of goods unlawfully imported, exported, or conveyed that constitutes the offence.

"Unlawfully" is a term commonly used in the description of offences and with a variety of meanings depending upon the context in which it is found. But its ordinary meaning is "something forbidden by a definite law whether Statute law or common law." In *R.* v. *Clarence* (1) *Stephen* J., a high authority in such matters, had occasion to interpret the word "unlawfully." In his judgment, after referring to the use of the word in the law of conspiracy, in which he says the meaning is "immoral and mischievous to the public," he proceeds: "The use of the word in relation to conspiracy appears to me to be exceptional. I think that no act can for this purpose" (that is, the creation of an offence) "be regarded as unlawful merely because it is immoral. It must, I think, be forbidden by some definite law."

Now, what is the definite law which in that sense makes it

(1) 22 Q.B.D., 23, at p. 40.

"unlawful" to be in possession after they have been imported of goods prohibited from being imported, or which forbids such possession? It is not forbidden by common law, or by any Statute unless the *Customs Act* 1901 forbids it. It is therefore upon the prosecution to show that the possession of prohibited goods after importation, with the knowledge that they are forbidden goods, is prohibited by the *Customs Act* 1901.

It must be admitted that there are no words expressly forbidding such possession. But it is urged that, because the goods are by sec. 50 prohibited from being imported and are by sec. 229 declared to be forfeited when they are imported, it necessarily follows that subsequent possession of them by any person with knowledge that they are prohibited imports must be also taken to be prohibited. In my opinion, that does not at all follow. The importation of the goods is expressly prohibited, and it is expressly made an offence to take part in, aid, or abet, the importation; but the possession of prohibited goods after importation, by a person who has had nothing to do with the importation, is not prohibited, either expressly or by implication. The forfeiture effected by the operation of sec. 229 vests the property in the goods in the Crown immediately on importation. It is admitted that no section of the Act forbids possession of them after importation, but it is said that the mere possession of forfeited goods is unlawful. Assuming—for it is not necessary to decide that point—that the Crown may without any process of condemnation take possession of forfeited goods wherever found, it is true that the possession of the subject would be in a certain sense in such a case unlawful as against the Crown, but not in the sense explained by *Stephen* J., not with the signification in which the word has been used in sec. 233.

Taking the word in that signification, it is clear that there are no provisions in the Act which prohibit a person from having possession of forfeited goods, nor can such prohibition be implied from any words of the Act. That being so, the fact that the goods are forfeited does not make their possession "unlawful" in the sense in which the word is used in the section. I have, therefore, come to the conclusion that there is no ground for interpreting the section as contended for by the respondent.

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In *Irving* v. *Nishimura* (1) the point now under consideration was not raised, but the possession there held to be an offence was a possession in the course or process of importation such as I have described. But it is said the words in question must be given some meaning, and, if that put forward by the respondent is not the true meaning, what effective meaning, it is asked, can be given to the section ? The answer to that question is not difficult. There are circumstances in which possession of goods in the course of importation is necessarily prohibited by the *Customs Act* 1901 The possession, for instance, of goods which are actually being smuggled, or being unlawfully imported, or unlawfully exported, or which are being unlawfully conveyed is necessarily prohibited by sec. 233 and by other sections of the Act. Any possession of the goods in course of being so dealt with is therefore "unlawful" in the sense in which that word is used in the section. It is against possession under these circumstances that the section is, in my opinion, directed. So interpreted, it amounts, no doubt, to a duplication in some respects of offences already created by other sections. But an examination of the *Customs Act* 1901 will disclose many instances in which the legislature for more abundant caution has prohibited in more than one section the same kind of dealing with goods.

For these reasons I am of opinion that the section does not make the mere possession of prohibited goods after they have been imported an offence, even although the possession is with knowledge that the goods are prohibited imports. It would follow that the conviction cannot stand, and that the appeal must be upheld.

ISAACS J. read the following judgment. This case depends on the construction to be placed on a few words in sec. 233 of the *Customs Act* 1901, namely :—"No person shall unlawfully . . . have in his possession any goods." I regret my inability to arrive at the same conclusion as my learned brothers. The facts as I read them are clear and amount to this : that the appellant had in his possession certain prohibited imports, forbidden by law to be on Australian territory at all, and consisting of goods

(1) 5 C.L.R., 233.

described by the Police Magistrate as "indecent, of an offensive and beastly character;" that he did not import them, but bought them from the importer and, as the magistrate found, knowing their true nature, and knowing that they had been imported, which implies their illegal presence in the country, and therefore knowing that holding them was holding forbidden articles.

The evidence, to my mind, establishes this beyond question. Independently of sec. 255 by which the averment in the information was *primâ facie* proof of the charge, it was also affirmatively established that on 28th December 1907 a Customs officer named Hotton went to the appellant's shop and, asking for some figures of an indecent character and being at first told by appellant that he did not keep them, was served—apparently in the ordinary course of business—with some china figures and ash trays that, according to the magistrate's description, were beastly. These, upon the appellant's own testimony, were purchased by him in what he calls the open market, and therefore with a full knowledge of their nature. His position as a dealer in articles of this kind is fixed beyond doubt.

On the afternoon of the same day he received from Mr. Abrahams of the Small Arms Co. a case of goods upon the terms that they were to be submitted to him and he was to inspect them. On the following Monday Hotton called again, asked for goods of a description similar to those asked for previously, and the appellant said he thought he had them. He went to the case and took out one of the articles complained of. The other Customs officers then entering the shop, the appellant hastily replaced the article. The officers searched and seized fourteen articles of a like nature which were in the case. He denied on oath that he had any idea of the contents of the case except when he went through it with Hotton. The magistrate disbelieved him and said:—"I find that on the Saturday afternoon previous to the seizure defendant got the case of goods into his possession and that they had been imported by the Small Arms Co. I am not satisfied that he was not aware of the contents. I think he was aware because when the officer came in he knew what was required and he produced it quickly from the box." This finding makes innocent acquisition impossible. In my view of the law,

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original innocence is immaterial, if possession is retained after guilty knowledge; but the facts present a clear instance of knowledge from the beginning that the goods were of a prohibited character, and are a good test as to how far private enterprise in contraband goods can go without being illegitimate.

It was contended on the appellant's behalf that he was not "unlawfully" in possession of the goods. First, it was said that the only possession penalized by sec. 233 is possession which by some other section in the Act is expressly declared to be unlawful or subject to a penalty. Sec. 5 declares that contravention of a section like sec. 233 is itself an offence punishable by the penalty at foot, and therefore some operative meaning, as I think, must be given to the words "unlawfully have possession of any goods." The words "unlawfully and injuriously" in a section "preclude all legal cause of excuse," per Lord *Ellenborough* C.J. in *R.* v. *Burnett* (1). *Mellor* J. in *Taylor* v. *Newman* (2) interpreted "unlawfully" as "without any claim of right or colour of justification"—which must of course be *bonâ fide*. There are numerous instances in the Criminal Codes of England and the Australian States where similar language is used to constitute an offence, but, if it were insisted that the illegality had to be defined by some other Statute, the provisions referred to would be useless. See, for instance, *R.* v. *Prince* (3), where *Bramwell* B. (representing the views of seven Judges besides himself) said that the word "unlawfully" means "not lawfully, otherwise than lawfully, without lawful cause." It is plain the legislature meant to make some possession unlawful, and I understand it to be possession that would contravene the Act, that would not exist if the provisions of the Statute were obeyed, and that the conscious possession by a person of any imported goods that could not, without some contravention of the Act, be in his possession at all is unlawful and therefore an offence. This view gives a reasonable force to the words, and is beyond question constitutional—the American cases establish this definitely. Any other view practically reduces them to a nullity.

(1) 4 M. & S., 272, at p. 274. (2) 4 B. & S., 89, at p. 94.
(3) L.R. 2 C.C.R., 154, at p. 173.

The only specific references to possession in the Act that I have found, apart from sec. 233, are in sec. 66 which requires possession of dutiable goods, derelict, flotsam, jetsam, lagan or wreck to be delivered to an officer without delay—under the penalty of £20; sec. 159 which relates to blank or partly blank invoices; sec. 207 enabling the Collector to retain possession of goods seized; sec. 229 (*q*) forfeiting dutiable goods found in the possession of a person landing from a vessel, and who had either denied or not fully disclosed the possession of the goods. Of these only sec. 66 would answer the appellant's test, and that on his argument must be excluded from sec. 233 because it affixes its own penalty, £20; but all the quoted sections together would offer a most inadequate reason for the enactment of the offence. The possession after importation of any goods whatever—except the insignificant case of sec. 66—and whether prohibited goods or otherwise, with the fullest knowledge of the most flagrant breach of the law committed by or during importation, would be untouched by the Act. The appellant's argument necessarily goes so far as to leave possession innocent notwithstanding thorough knowledge at the time of acquisition that the goods were illegally imported. Nowhere in the Act is acquisition of prohibited goods after notice of illegality expressly made unlawful any more than subsequent possession after notice of illegality. If one is lawful so is the other. The goods are forfeited it is true, and may be seized if found, but a person receiving them in the way described, may conceal them with impunity and so prevent a seizure, though he may not destroy them under a penalty of 5 years' imprisonment with hard labour (sec. 232); that is, in the appellant's view, imprisonment for destroying goods of which he is in lawful possession. If his possession is not unlawful before seizure no penalty can reach him, for the Act says nothing specifically about concealment. He may pass the goods on at a profit, either by exporting them or shouldering all risk on to an innocent person who loses the goods, while he himself escapes all loss and penal visitation. The goods may be still according to the Act subject to the control of the Customs, and by law should be in possession of the Customs, the duties may not have been paid, no entry made, the goods may have

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been surreptitiously taken from the warehouse, or smuggled, they may have been rescued by force from an officer, they might have even been condemned as forfeited, and yet the possession—with full knowledge of all these facts—is, by the argument, not "unlawful" because the Act has not in so many words declared it to be unlawful; though on a fair construction of the Act it cannot be lawful. In my opinion, this position is utterly untenable, and would in many respects hamper and defeat the Statute; see, for instance, sec. 196, which gives powers for suspected unlawful carrying. Now, if there were no sec. 233 at all, it is obvious that prohibited goods, imported against the express command of the Statute, are illegally at large in Australia, and sec. 229 forfeits them *ipso facto* to the King: see *The Annandale* (1); *McLane* v. *United States* (2); *Stockwell* v. *United States* (3); and *United States* v. *Stowell* (4). No subject has any right to hold them; they never are lawfully imported, and therefore are never lawfully here at all. Their very presence in Australia is in contravention of the law, and when here should be returned by a purchaser to his vendor, or should be delivered to the Customs, the Crown having the right to the goods, though seizure and condemnation or its equivalent may be necessary to perfect the title.

I do not think it necessary to rely upon the forfeiture section at all for the purpose of establishing unlawful possession. But its presence strengthens the view that the legislature has regarded the possession of prohibited imports by private individuals as wholly unauthorized. It is, however, clear in this case that, not only were the goods forfeited by the terms of the section, but they were actually *seized* by the Customs officers, and as Lyons himself was present the law required no further notice to him, sec. 205; the onus by that section being cast on him in that case to claim them within a month, otherwise they are deemed to be condemned. No such claim appears in this case, although more than a month elapsed between the seizure and the hearing, and it was not disputed that the goods were prohibited imports and forfeited. In the strictest view then of the forfeiture section, it

(1) 2 P.D., 218.
(2) 6 Pet., 404.
(3) 13 Wall, 531, at p. 546.
(4) 133 U.S., 1, at pp. 16 and 17.

might well be argued that at the date of the hearing in the Court below the title had divested from the appellant and vested in the Crown as from the importation. I prefer, however, in view of the public importance of Customs administration, to reserve my opinion as regards the forfeiture question itself, and to rest my judgment upon general considerations apart from the forfeiture section except as affecting the construction of the Statute as a whole.

Is then a conscious possession of prohibited imports a wrong and reprehensible thing so as to bring it within the ordinary scope of a section like 233 ? In *Attorney-General* v. *Radloff* (1) *Parke* B. said:—"It is a crime and an injury to the public to disobey Statute revenue laws." *Pollock* C.B. said (2):—"I cannot distinguish, either in morals or law, between cheating the State and cheating a private individual. I cannot distinguish between endeavouring by concealment and fraud to prevent that from being paid which is necessary for the public service, and by similar concealment and fraud depriving one of her Majesty's subjects of that which is his lawful right and due." I cite these to show the quality of the Act. The person who evades payment of duties or the prohibitory clauses of the Act is a public offender; can it be reasonably contended that another who knows of his offence is morally justified in taking from him the proceeds of that offence ? And if *bonâ fide* taken at first, should subsequent knowledge of that offence be brought home to the recipient is he morally absolved though he still secretly retains the profits of the public plunder or public disadvantage ? As well, in my opinion, can a man either morally receive stolen property knowing it to be stolen, or, if he at first gets it honestly, retain it after knowledge of the truth. That one offence is at common law and the other by Statute is nothing to the point, as the two learned Barons in effect indicated. And if it is wrong to injure an individual, is it less reprehensible to injure the whole community ? And why is such a case as I have suggested not within the plain, wide and intelligible words "unlawfully have possession of any goods ?" Because, it is said, no other section makes the possession unlawful

(1) 10 Ex., 84, at p. 105. (2) 10 Ex., 84, at p. 109.

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in so many words. But if authority were needed to establish, either that possession may be without lawful excuse, or in other words unlawful possession, by mere force of the penalizing section, or that even lawful excuse at first may disappear upon subsequent knowledge of the facts, it is found in the case of *Dickins* v. *Gill* (1). An English Act, the *Post Office (Protection) Act* 1884, by sec. 7 provided that "a person shall not make . . . or, unless he shows a *lawful excuse, have in his possession* any die, plate, or instrument for making any fictitious stamp." It also enacted that "any stamp, die, plate, instrument, or materials found in the possession of any person in contravention of this section, may be seized and shall be forfeited."

No other section made possession unlawful, or, in other words, took away any lawful excuse that might otherwise exist. The section in the *Post Office Act* did exactly what sec. 233 and sub-sec. (*a*) of sec. 229 together do, it made the same act at once an offence and a cause of forfeiture. It is important to recollect that, in order to understand the full meaning of the judgment. The defendant was proceeded against for £20 penalty for having in his possession a die and instrument for making a fictitious stamp. His defence was that it was not made in England and therefore the making was not in contravention of the Act; that it had been made abroad for him at his order for newspaper purposes; that it had been imported from Europe by another, and that defendant had received it from the importer; that he had obtained it not for any nefarious purpose but to illustrate a newspaper, not in colours but in black and white. This was proved or admitted. The magistrate found absolute *bona fides*, and that there was a certainty that the defendant would not use the die for any improper purpose. He thought this was evidence of a lawful excuse, found as a fact that there was a lawful excuse, and dismissed the information. The case came on appeal before the Queen's Bench Division. During the course of the argument the defendant's counsel pointed to the *Stamp Duties Management Act* making it felony, if a person "knowingly and without lawful excuse" has in his possession a forged die or stamp, and said that, if the Crown were right, a man who bought a stamp as genuine and discovered

(1) (1896) 2 Q.B., 310.

subsequently that it was fictitious would be liable under that section to be convicted of felony. Mr. Justice (now Lord) *Collins* asked (1):—"In that case would there not be a difference in his position before and after he discovered that the stamp was fictitious?" I would here observe that the learned Judge saw no difficulty in the possessor getting rid of the article in some way.

I cite from the judgment of the same learned Judge who speaking of possession said (2):—"It seems to me that there, again, that must be a conscious act, and that what is struck at is a person having a fictitious stamp consciously in his possession, and therefore being obliged to defend that possession by making an excuse. In my judgment, it is unnecessary to deal with the very refined and ingenious argument for the respondent on this point, because as a practical matter I think it would be impossible to divide the innocent from the culpable part of the act of a person who is challenged with being in possession of a fictitious stamp. It would not be *ad rem* for him to say, 'I can explain how I came to *get* possession of it,' unless he was prepared to defend the *retaining* possession of it; and the moment the legislature or the proper authority had intervened, he would be called upon to hand it back under the later paragraph of the section."

Later on the learned Judge repeats his statement that, however innocent the original possession was, it would cease to be innocent the moment his attention was called to it by the Executive asking him to give it up.

Of course, if before the Executive called his attention to it someone else did so, his knowledge, however acquired, would terminate his innocence, and he would therefore be holding possession in contravention of the Act. There was no power to seize and no forfeiture by that Statute except for an act which already subjected the defendant to a personal penalty. *Grantham* J. said he might have been liable under another part of the section, but *Collins* J. did not say so; and as importing was not made an offence by the Act, there was apparently nothing in the facts but possession without lawful excuse which could affect the defendant. The charge was for having possession as here, so the Court treated it, and allowed the appeal, though up to the time of the

(1) (1896) 2 Q.B., 310, at p. 313.
(2) (1896) 2 Q.B., 310, at p. 317.

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alleged offence no intervention had taken place by the Executive. On the appellant's argument here, as no other part of the English Act made possession an offence or unlawful, or in other words deprived the owner of a lawful excuse, the decision should have been the other way; but that would have been out of line with all the decisions I know of.

Apart altogether from sec. 233, the possession of the appellant was under the circumstances unlawful or without legal excuse. It was certainly in defiance of and calculated to defeat the *Customs Act*, and to help the importer to profit by his contravention of its requirements. Lord *Mansfield* in *Holman* v. *Johnson* (1) put the very case and regards it as unlawful. He cites a passage from Huberus:—"*In certo loco merces quædam prohibitæ sunt. Si vendantur ibi, contractus est nullus.*" The learned Judge thus translates it with local application: "In England, tea, which has not paid duty, is prohibited; and if sold there, the contract is null and void." It must be observed that in the case in hand Lord *Mansfield* was considering the breach of the revenue laws.

Another instance of illegality of vitiating an agreement is *Billard* v. *Hayden* (2), and it would be hard to get a case more directly in point. The side note is in these words:—"If the importation of certain goods be prohibited, and the plaintiff sell such goods in this country to A., who indorses a bill of exchange to him in payment, the plaintiff cannot recover on that bill against the acceptor, although there was no evidence that the plaintiff was the importer of the prohibited goods. *Abbott* C.J. said (3):—"The Statute of 50 Geo. III., c. 55, prohibits the importation of all foreign silks, and I have no hesitation in saying that if these were foreign silks, and the bill was given in payment for them, the plaintiff cannot recover."

The mere fact of the goods being prohibited merchandise led both those distinguished jurists to regard such transactions as illegal, and, therefore, without sec. 233, the transaction by which Abrahams on the one hand and Lyons on the other dealt with the goods was unlawful. I am not able to rely on any distinc-

(1) 1 Cowp., 341, at p. 344.
(2) 2 C. & P., 472.
(3) 2 C. & P., 472, at p. 474.

tion between illegality being *malum prohibitum* and *malum in se*. If a thing is illegal it is illegal no matter how the unlawfulness arises, and the same consequences often follow. The two cases I have just cited recognize this. *Abbott* C.J. in *Cannan* v. *Bryce* (1), said of such a suggested distinction :—" We think no such distinction can be allowed in a Court of Law ; the Court is bound, in the administration of the law, to consider every act to be unlawful, which the law has prohibited to be done." And so *Best* J. in *Bensley* v. *Bignold* (2) said :—" The distinction between *mala prohibita* and *mala in se* has been long since exploded. It was not founded upon any sound principle, for it is equally unfit, that a man should be allowed to take advantage of what the law says he ought not to do, whether the thing be prohibited, because it is against good morals, or whether it be prohibited, because it is against the interest of the State."

So here Abrahams ought not to be allowed to take advantage of his offence, nor Lyons knowingly to take a similar advantage. It was a nefarious act.

Still, without sec. 233, it would have been an offence punishable by fine. Though unlawful, and unlawful by the necessary construction of a definite law, the *Customs Act* 1901, the possession would have no criminal penalty attached to it. That section applies the further remedy of penalty to the act, and that penalty should be enforced. I have assumed so far that that section refers to prohibited goods as such and to make their conscious possession an offence. This is, however, disputed, substantially, because sec. 229 makes separate enumeration in (*a*) and (*b*) of goods unlawfully imported and prohibited imports respectively. But that is not, in my opinion, a view that can be entertained. The legislature had no intention to strike with £100 penalty the possession of an ordinary commercial article as to which some formality had been omitted, and to allow the possession of dishonest, debasing and dangerous imports to pass unnoticed. The reason for the two subsections is to me obvious. " Unlawfully " is not equivalent to " knowingly," but knowledge of the goods imported at the time of importation is necessary to constitute the offence of

(1) 3 B. & A., 179, at p. 183. (2) 5 B. & A., 335, at p. 341.

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"unlawfully importing:" *Irving* v. *Nishimura* (1); *R.* v. *Woodrow* (2); *R.* v. *Cohen* (3); and *Robinson Brothers* v. *Dixon* (4). This fact entirely gets rid of all hardship arising out of difficulty of recognizing the goods as prohibited articles, or as having been otherwise unlawfully imported. Consequently, knowledge is necessary to forfeiture for "unlawfully importing," which is (*a*) of sec. 229. But by (*b*) prohibited imports are forfeited however they come, and although the importer is not personally liable because of unconscious possession. But that is no reason why conscious possession of prohibited imports is not an unlawful possession. Sub-sec. (*j*) of sec. 229, as pointed out, would be strangely used to forfeit a carriage or an animal for conveying an ordinary admissible article of merchandise landed perhaps at an unappointed wharf, but not for conveying prison made goods, fraudulently marked goods, counterfeit money, or dangerous articles. And a consistent application of the principle that separate enumeration means mutual exclusion would end in depriving the words "unlawfully import, export, convey or have in his possession" of all meaning whatsoever, because everything they could, on the appellant's contention, possibly refer to is elsewhere provided for. Nevertheless, though they mean nothing, breach of them is gravely punished with a penalty of £100. The American cases of *Wood* v. *United States* (5); *United States* v. *Kee Ho* (6); *United States* v. *Claflin* (7) and *United States* v. *Thomas* (8) are all opposed to the arguments advanced. I take the words "unlawfully import" to have their ordinary meaning, which is "import contrary to law" or "import in contravention of this Act."

The only other question raised is whether the possession referred to in sec. 233 is limited to the process of importation. It appears to me that the easiest way to elucidate this matter is to arrange the various offences in the first part of the section in their order thus:—No person shall,

(1) smuggle any goods; or

(2) unlawfully import any goods; or

(1) 5 C.L.R., 233.
(2) 15 M. & W., 404.
(3) 8 Cox Cr. Ca., 41.
(4) (1903) 2 K.B., 701.
(5) 16 Pet., 342, at p. 363, *per Story* J.
(6) 33 Fed. Rep., 333.
(7) 13 Blatch., 178.
(8) 2 Abb. U.S., 114.

(3) unlawfully export any goods; or

(4) unlawfully convey any goods; or

(5) unlawfully have in his possession any goods &c;

Each is independent of the other, and they are equally separate and distinct. Possession in connection with the commission of unlawful importation is punishable as unlawful importation by virtue of secs. 233, 236, and 237 combined. To extend the 5th offence no further would therefore give no effective independent meaning to the language of the legislature, and would permit, as already observed, open and wholesale traffic in goods that have to the knowledge of the recipient broken through the most stringent provisions of the *Customs Act*, designed for the protection of the revenue of the Commonwealth, and the health, morals, and property of the Australian people. I am unable to see why ordinary and comprehensive words in a Statute of a comprehensive nature, the scope and object of which are so apparent, are not to have their ordinary and primary meaning. No conjecture or construction is necessary to bring the appellant within them; it requires, to my thinking, considerable conjecture and construction to get him out of them.

It is said that this is a penal Act. But it is not merely a penal Act. And I think we ought to apply the rule as stated by the Privy Council in *The Gauntlet* (1):—"Where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair commonsense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal Statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument."

In my opinion, if the commonsense meaning of the language used is taken, the appellant is brought within the very letter and spirit of the Act, and the conviction ought to be affirmed.

HIGGINS J. read the following judgment. In this case, the defendant had certain goods for sale of an "offensive and beastly character," as the Police Magistrate finds; and wanted to make

(1) L.R. 4 P.C., 184, at 191.

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profit by pandering to vice and ministering to pruriency. But the only question now is, has the defendant committed an offence within the meaning of sec. 233 of the *Customs Act* 1901? It is our duty not to allow indignation and disgust to sway us in our construction of the Act. For we cannot treat the mere possession of these obscene goods as unlawful, as a crime on the part of this defendant, unless we treat the mere possession of any other goods, not obscene, which have been unlawfully imported, —such as copyrighted books, prison-made goods, or exhausted tea, or oleomargarine—as unlawful, as a crime on the part of a man who buys them innocently twenty or fifty years hence,— at all events, if he afterwards learn that they have been unlawfully imported. After all, it is the State Parliament and not the Commonwealth Parliament that is primarily concerned with the morals and moral health of the people. There is already some State legislation in Victoria on the subject of obscene publications (see *Police Offences Act* 1890); but it does not seem to apply to conduct such as the defendant's in this case. But although morals are legitimate matter for the State legislature, the federal Parliament has also unlimited power to deal with trade and commerce with other countries; and under that power it can undoubtedly prohibit the importation of indecent or obscene articles. This power may be exercised in the interests of morals; it may follow up the prohibited articles after importation to a degree which is not necessary for us at present to define; but any legislation must be directed to the act of importation, and be incidental to the federal powers with regard to importation.

Now, sec. 233 provides that:—"No person shall smuggle or unlawfully import, export, convey or have in his possession any goods"; penalty £100. No one is to smuggle, *i.e.*, import goods with intent to defraud the revenue (sec. 4). The word "unlawfully" is not used before "smuggle," because the word "smuggle" connotes an intention to defraud, and because smuggling has not previously been made unlawful by the Act. But then comes the provision that no one shall "*unlawfully* import, export, convey or have in his possession goods." The use of the word "unlawfully" indicates that the importing, exporting &c., or the mode of importing, exporting &c., is forbidden or condemned somewhere

else, most probably in other sections of the Act. Now, Part IV. of the Act deals with the importation of goods, and prescribes how they shall be imported. For instance, under sec. 74, no goods are to be unshipped except as prescribed, or with a Collector's permit, or after entry passed. But the penalty affixed by sec. 74 seems to be applicable only to the persons who unship—to the persons who have control of the boat or vessel, and who have to land the goods (see sec. 5); and therefore sec. 233 takes up the subject, and applies a penalty also to the man who imports in contravention of the section. The mode of importation is condemned. It is not "due importation" (sec. 49); and sec. 233 is meant to ensure that not only the unshippers, but the importers, are to be punished. Then Part VI. deals with the exportation of goods, and prescribes how they shall be exported. For instance, under sec. 114, before any goods are taken on board a ship for export, the ship must be entered outwards, and the goods must be entered for export. Exportation without these precautions is forbidden, is unlawful. But there is no penalty affixed for the contravention of this section, and no person is definitely pointed at as responsible for adopting this unlawful mode of exportation; and therefore sec. 233 makes the contravention of the section an offence on the part of the man who exports in the manner condemned by sec. 114. As for "unlawfully convey," both in Part IV. and in Part VI. there are restrictions imposed as to the mode of conveying goods from ships for import, and to ships for export. For instance, under sec. 75, all goods unshipped have to be landed directly at a wharf, or be conveyed thereto in a licensed lighter &c.; and under sec. 115 goods for exportation must be shipped directly at a wharf or be conveyed to the ship in a licensed lighter &c. There is in each case a penalty affixed; but it is applicable only to the man who lands or to the man who ships contrary to the section—that is to say, it seems to be applicable only to those who have to land the goods or to ship the goods. Then sec. 233 comes in, and makes it an offence on the part of the person who conveys, as well as on the part of the person landing or the person shipping, if the goods be conveyed in the manner forbidden by the section. The mode of conveyance is forbidden, is unlawful. The application of the sec. 233 is, there-

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fore, perfectly clear so far, if we take it as creating a new offence as to smuggling, and as to the rest of the section, as making an act, which has already been treated as an offence on the part of A., an offence also on the part of B. But what shall we say as to the words "unlawfully . . . have in possession any goods"? They must be read in the same light as "unlawfully import" or "unlawfully export," or "unlawfully convey"; that is to say, we must find something in the rest of the Act or elsewhere which makes possession of goods unlawful. If there is nothing in the rest of the Act or elsewhere to make possession of goods unlawful, the result is that, under the Act as it stands, there is no offence in mere possession, for there is certainly nothing in this section making mere possession unlawful. If no other section declares possession to be unlawful, this section does not do so; it assumes that the unlawfulness is determined *aliunde*. We have no right to find that possession of any goods is unlawful unless Parliament says that it is unlawful. As *Stephen* J. said in *R.* v. *Price* (1), "the great leading rule of criminal law is that nothing is a crime unless it is plainly forbidden by law." In my opinion, it is not necessary for the appellant to point out in the Act any provision to which the phrase "unlawfully have in possession any goods" can refer if it does not refer to possession under the circumstances of this case. It is sufficient if the defendant can show that his possession is not made unlawful by this or any Act. But the argument that the phrase is not otherwise applicable to anything in the Act is an argument of much force, though not conclusive. It would be a strong argument if we had to construe language which is ambiguous. However, it is not at all clear that the phrase cannot be applied (*inter alia*) to a master or owner who does not place the goods mentioned in sec. 76 in a place of security approved by the Collector, but keeps possession of them; or to an owner who does not warehouse the goods mentioned in sec. 116, but keeps possession of them. He has the goods in his possession, and unlawfully. But whether the phrase can be so applied or not, we come back, finally, to the fundamental question—where is there anything making the possession of unlaw-

(1) 12 Q.B.D., 247, at p. 256.

fully imported goods unlawful? For this purpose I may assume that prohibited goods come within the phrase "goods unlawfully imported." On this assumption, it is an offence to *import* prohibited goods; but what is there to make it an offence to *possess* prohibited goods? The substratum of the British law is liberty. Every man is entitled to possess any goods unless the law forbid him, expressly or by necessary implication; and there is nothing that I can find in the Act to make unlawful the mere possession of unlawfully imported goods. If a legislature make the importation of certain goods unlawful, it does not follow that it has made the possession of these goods unlawful. It has made the importer a criminal; where has it made the possessor a criminal? If the legislature desire to make the possessor of obscene articles a criminal, it must say so plainly. If the legislature desire to make unlawful the acquisition of unlawfully imported goods with the knowledge that they have been unlawfully imported, it must say so plainly; and, indeed, acquisition with such knowledge is not the offence charged here. It is not for this Court, or any Court, to act on conjecture as to the intentions of the legislature. Counsel for the Customs argue that the existence of these articles, or of prison-made goods, or of exhausted tea, in Victoria is in violation of the law, and that if a man has them in his possession without just cause, his possession is unlawful. But this is merely to bring us back to the same question—what is just cause? It is a sufficiently just cause if he, as a free man, owns them, and if there is no law that says it is unlawful for him to possess them. To be unlawful, an Act must "be forbidden by some definite law": *R.* v. *Clarence* (1). There is no offence unless the possession is in itself illegal (2).

I have purposely confined my judgment, as regards interpretation, to the words of the Act in question. No doubt one can sometimes get illumination from considering the language of Judges in interpreting analogous Acts. But, as in interpreting wills, it is the will of the particular testator that has to be interpreted, and not the wills of other testators, our first duty is to find whether the Act in question is intelligible within its own bounds—though, of course, all the legislation on the subject may

(1) 22 Q.B.D., 23, at p. 41. (2) 22 Q.B.D., 23, at p. 62.

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be considered. I do not think that such cases as *Dickins* v. *Gill* (1) are guides for us, but rather will-o'-the-wisps, in determining this case. In that case, the offence charged was the possession of a die for imitation of a current postage stamp; and the section forbade a man to have such a die in his possession "unless he shows a lawful excuse." The words used are not the words here; and the use of the word "excuse" indicates that there is something to excuse, that the possession without excuse is unlawful. But in the present case, the whole question is, has the Act made possession unlawful; and this has to be demonstrated, not assumed?

I have not dealt at length with the difficult question whether "goods unlawfully imported" include (*inter alia*) prohibited imports, such as these goods. I prefer to base my opinion on the ground that there is nothing in the Act—or elsewhere—to make mere possession of unlawfully imported goods unlawful. It is quite possible for me, as a citizen, to feel strongly that the possession of such goods as these, under the circumstances of this case, ought to be an offence; but, as a Judge, I am bound to say that sec. 233 does not make it an offence. I am therefore of opinion that the appeal should be allowed.

Appeal allowed. Conviction quashed. Information dismissed with 5 guineas costs. Respondent to pay costs of appeal.

Solicitor, for the appellant, *A. E. Jones.*

Solicitor, for the respondent, *Powers*, Commonwealth Crown Solicitor.

B. L.

1) (1896) 2 Q.B., 310.