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The question whether there was any evidence to go to the jury is one of law, and if there was not, there has been a violation of a principle of natural justice. There are conflicting decisions in Victoria as to the effect of evidence of similiarity between goods missed and goods subsequently found in the possession of persons who cannot account satisfactorily for that possession.

[O'CONNOR J.—No general rule can be laid down as to when proof of similarity amounts to proof of identity.

GRIFFITH C.J.—If special leave to appeal were granted in this case it might be granted in any case of circumstantial evidence.]

Per curiam. It is impossible to bring this case within the rule which has so often been laid down by this Court. Special leave to appeal will be refused.

Special leave to appeal refused.

Solicitor, for the appellant, *J. S. Mornane.*

B. L.

[HIGH COURT OF AUSTRALIA.]

SARGOOD BROTHERS . . . . . PLAINTIFFS;

AND

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THE COMMONWEALTH AND ANOTHER DEFENDANTS.

MELBOURNE, *June* 2, 7, 8; *Sept.* 12.

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

Customs duties—Duties collected under proposed tariff—Proposed tariff different from tariff enacted—Right to recover money paid for duty—Voluntary payment—"Dispute" as to duty—Value of goods for purpose of duty—Outside packages containing goods dutiable ad valorem—Customs Act 1901 (*No.* 6 *of* 1901), *secs.* 154, 167, 226—*Customs Tariff* 1902 (*No.* 14 *of* 1902), *sec.* 6, *Schedule A—Customs Tariff* 1908 (*No.* 7 *of* 1908), *secs.* 3, 4, 5, 7, *Schedule A—The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 55.

The words "duties of Customs" in sec. 7 of the *Customs Tariff* 1908 include moneys demanded by the Collector of Customs and paid in respect of imported goods under such circumstances that, if the tariff proposed in Parliament on 8th August 1907 or any proposed amendment thereof had, at the time of the demand and payment, been a lawfully imposed tariff, the moneys would have been properly collected as Customs duties.

So *held* by *O'Connor*, *Isaacs* and *Higgins* JJ. (*Griffith* C.J. dissenting).

Cowan & Sons v. *Lockyer*, 1 C.L.R., 460, distinguished.

Where moneys were demanded under such circumstances as above set out and were paid without protest,

Held by *Griffith* C.J. and *O'Connor* and *Higgins* JJ., that, as there was no "dispute" within sec. 167 of the *Customs Act* 1901, the payment was not voluntary and, therefore, that an action would lie to recover the moneys paid, if the collection of the moneys was not subsequently ratified by Parliament.

Per Isaacs J.—There was no "dispute" within sec. 167, and, as the plaintiffs could by raising a "dispute" have obtained the goods without "payment" of the duty, the payment was voluntary. and therefore the action would not lie.

The value of outside packages in which goods subject to duty according to their value are imported is not included in the value of those goods as defined by sec. 154 (*a*) of the *Customs Act* 1901.

So *held* by *Griffith* C.J. and *Higgins* J. (*O'Connor* and *Isaacs* JJ. dissenting).

QUESTIONS of law reserved for the Full Court.

An action was brought in the High Court by Sargood Brothers against the Commonwealth and (in the alternative) Archibald William Smart, Collector of Customs for the State of Victoria, to recover the sum of £188 8s.

In the Schedule to the *Customs Tariff* 1902, Division XVI. (*x*) the following special exemption appeared :—"Outside packages, n.e.i., in which goods are ordinarily imported when containing such goods."

In the Schedule to the Customs Tariff as proposed in Parliament on 8th August 1907, Division XVI., Item 444 was as follows :—"Outside packages, n.e.i., in which goods other than those subject to an *ad valorem* duty are ordinarily imported when containing goods—Free." On 12th December 1907 this Item 444 was amended by Parliament to read as follows :—"Outside

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packages, n.e.i., including the sole containing package, in which goods are ordinarily imported, when containing such goods— Free," and appears in that form in Division XVI., Item 450 of Schedule A. to the *Customs Tariff* 1908.

The plaintiffs, who were merchants and importers, between 9th August 1907 and 12th December 1907 imported into Victoria certain goods contained in outside packages.

The contained goods were liable to *ad valorem* duties under the tariff proposed on 8th August 1907, and the Customs officers demanded duty upon the goods, and for the purpose of ascertaining the values of the goods for the purposes of the duty added the values of the outside packages. The plaintiffs paid the sums so demanded, without any express protest at the time, and the sum they now sought to recover was the amount of the sums so paid attributable to the values of the outside packages.

The defences raised by the defendants sufficiently appear from the judgments hereunder.

The action was heard by *Isaacs* J., who reserved all the questions of law which arose for the consideration of the Full Court to adjudge in whose favour and what judgment should be entered.

Mitchell K.C. (with him *Schutt*), for the plaintiffs. The value of outside packages in which dutiable goods are contained do not form part of the value of the goods within the meaning of sec. 154 of the *Customs Act* of 1901. A strong distinction is drawn in many sections of that Act between goods and the packages in which they are contained. Sec. 154 only applies when the goods are in fact dutiable. Under the *Customs Tariff* 1902 there was a special exemption in respect of the outside packages in which dutiable goods were contained, and under the *Customs Tariff* 1908 the goods which these outside packages contained were not dutiable, so that at the time the moneys in question here were demanded and paid there was no legal duty on the goods contained in them, nor was that which was demanded and paid given the force of a legal duty by sec. 7 of the *Customs Tariff* 1908.

Outside packages are specially exempt from duty by item 450 of Schedule A to the *Customs Tariff* 1908, and the exemption

was by sec. 4 made effective as from the date of the introduction of the tariff to the House of Representatives. The words "Duties of Customs" in sec. 7 of the *Customs Tariff* 1908 have the same meaning as in secs. 4 and 5. They do not mean sums of money paid under the proposed tariff unless those sums have become duties by the *Customs Tariff* 1908: *Cowan & Sons* v. *Lockyer* (1). Sec. 7 is intended to afford an indemnity for the protection of Customs officers. Duties on outside packages do not come within sec. 7 because the moneys paid cannot be said to have been collected under any tariff, as the tariff as proposed did not purport to impose a duty on them. Sec. 167 does not apply, for that section only applies to legal duties of Customs, and not to sums collected under a proposed tariff but which do not afterwards become duties.

Counsel also referred to *Stephens* v. *Abrahams* (2); *Hooper* v. *Exeter Corporation* (3); *Sargood* v. *The Queen* (4); *Payne* v. *The King* (5); *Wollaston's Customs Law*, p. 446; *Donohoe* v. *Britz* (6); *Colonial Sugar Refining Co.* v. *Irving* (7).

Starke, for the defendants. Outside packages were dutiable as accessories to the goods contained in them by virtue of sec. 154 of the *Customs Act* 1901. Item 444 of the tariff as proposed on 8th August 1907 means that outside packages in which goods subject to *ad valorem* duties are contained are to be dutiable as part of the goods contained. If the packages are not caught by sec. 154 or by item 444, they are dutiable under item 306. Sec. 7 of the *Customs Tariff* 1908 is not intended to indemnify officers for acts done under the proposed tariff. If it were, it would be an infringement of the Constitution. According to the plaintiffs' contention it does not wholly indemnify those officers, because it only applies to duties under the proposed tariff which afterwards became law. It would only be a protection in respect of acts already protected under sec. 5. The section is intended to validate the collection of all moneys demanded as duties under the proposed tariff. *Cowan & Sons* v. *Lockyer* (1) did not put an

(1) 1 C.L.R., 460.
(2) 27 V.L.R., 753; 23 A.L.T., 233.
(3) 56 L.J.Q.B., 457.
(4) 4 V.L.R. (L.), 389.
(5) (1902) A.C., 552.
(6) 1 C.L.R., 391.
(7) (1906) A.C., 360.

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interpretation on sec. 7 except as to the meaning of the word "collected." Any further interpretation of sec. 7 was unnecessary to the decision. The sums of money in question here were "collected" within the meaning of that section, for they were neither deposited under sec. 167 of the *Customs Act* 167 nor were they paid into a suspense account. The plaintiffs could have proceeded under sec. 167, for that section applies where the Crown demands money and the merchant refuses to pay it, and whether or not at that time the money could be legally recovered by the Crown. Sec. 226, if it applies, does not prevent sec. 167 from operating in respect of moneys collected under a draft tariff, for the Court might stay that action until the tariff was passed. The question for decision would in that action then be was the money payable under the law as it then existed. Sec. 226 only relates to proceedings against an officer for acts done by him for the protection of the revenue and not to an action begun under sec. 167. Sec. 167 is an answer to any allegation of hardship. It cannot be said that the money was paid under compulsion of law if the plaintiffs could have proceeded under sec. 167.

Counsel referred to *Sargood* v. *The Queen* (1); *Hamel's Law of Customs*, p. 39; *R.* v. *Commissioners of Customs* (2).

Mitchell K.C., in reply, referred to *Stevenson* v. *The Queen* (3); *Union Steamship Co. of New Zealand* v. *Melbourne Harbour Trust Commissioners* (4); *Deakin* v. *Webb* (5).

[ISAACS J. referred to *Greenway* v. *Hurd* (6).

HIGGINS J. referred to *Bullen & Leake's Precedents of Pleadings*, 6th ed., p. 259.]

Cur. adv. vult.

Sept. 12.

The following judgments were read:—

GRIFFITH C.J. The main questions arising for determination in this case are short and simple. Although the money claimed is a comparatively small amount, we are told that our decision will apply to many thousands of pounds paid to the Customs Department under exactly similar circumstances.

(1) 4 V.L.R. (L.), 389.
(2) 5 A. & E., 380.
(3) 2 W.W. & aB. (L.), 143.
(4) 9 App. Cas., 365.
(5) 1 C.L.R., 585, at p. 604.
(6) 4 T.R., 553.

There is no conflict as to the facts. The goods in respect of which the money in question was demanded and paid as and for duties of Customs were outside packages containing dutiable goods. Such packages were the subject of special exemption from duty under the Schedule to the *Customs Tariff* 1902 (assented to on 16th September 1902), which took effect retrospectively as from 8th October 1901. They are also exempt from duty under the Schedule to the *Customs Tariff* 1908 (assented to on 3rd June of that year), which took effect retrospectively as from 8th August 1907. The retroactive operation of Tariff Acts is quite familiar, and it has the effect under the express provisions of sec. 153 of the *Customs Act* 1901 of creating a debt due to Crown as from the date on which the law is to be deemed to have come into force. It is a well known practice (sanctioned by necessity as well as usage), when duties of Customs have been proposed to Parliament, to exact the proposed duties in anticipation of the subsequent ratification of the collection by a retrospective Statute.

The duties now in question were collected between 9th August and 12th December 1907 in respect of the value of outside packages containing goods made subject to *ad valorem* duty both under the tariff of 1902 and that of 1908.

On 8th August 1907 a draft tariff was laid before the House of Representatives by which it was proposed to exempt from duty outside packages n.e.i. in which goods other than those subject to *ad valorem* duty are ordinarily imported, when containing such goods. This proposed exemption did not apply to the packages now in question, which contained goods subject to *ad valorem* duty, but most of them would have been dutiable under another proposal of the draft tariff if it had been adopted by Parliament. It was not, however, adopted in the form proposed, and under the tariff set out in the Schedule to the *Customs Tariff* 1908 the packages remained exempt from duty as they had been before.

In my opinion the payment of money demanded under such circumstances ought to be regarded as being (as it is in fact) a provisional payment to abide the event, the event being the adoption or non-adoption of the proposal by Parliament. It is not seriously disputed that money exacted under such circum-

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stances is exacted *colore officii*, or that in the absence of some statutory provision to the contrary it can be recovered if the proposal is not adopted. Nor is it disputed that under sec. 56 of the *Judiciary Act* 1903 an action will lie against the Commonwealth to recover it. That point was decided in the case of *Baume* v. *Commonwealth* (1).

The plaintiffs now claim a refundment of the money. To this claim the defendants make two defences, both of which depend upon the construction of a few words in two Statutes.

The first defence is founded upon sec. 167 of the *Customs Act* 1901, which provides that:—

"If any dispute shall arise as to the amount or rate of duty or as to the liability of goods to duty the owner may deposit with the Collector the amount of duty demanded and thereupon the following consequences shall ensue:—

"(1) The owner upon making proper entry shall be entitled to delivery of the goods.

"(2) The deposit shall be deemed the proper duty unless by action commenced by the owner against the Collector within six months after making the deposit the contrary shall be determined, in which case any excess of the deposit over the proper duty shall be refunded by the Collector to the owner with Five pounds per centum per annum interest added.

"The provisions of this section shall not apply to any goods which may be detained or seized for undervaluation or in respect to which any attempt to evade the payment of duty may have been made."

The defendants contend that when a demand is made by the Customs authorities in accordance with the recognized practice to collect proposed duties of Customs before their actual imposition a "dispute" arises within the meaning of the section.

In my opinion it is impossible to regard the circumstances as giving rise to a dispute within the meaning of sec. 167. Both parties were aware that the goods were not by law liable to duty. The only question upon which a difference of opinion could arise was whether Parliament would or would not in the future ratify

(1) 4 C.L.R., 97.

the collection. The kind of dispute intended is clearly shown by the provision that the deposit shall be deemed the proper duty unless by action brought by the owner against the Collector within six months the contrary shall be determined. It is suggested that the "contrary" to be determined is the question of fact whether Parliament had before the determination passed a retrospective Act. It may be from a perverted sense of humour, but I feel a difficulty in treating the argument with due gravity. The suggested action would be in the nature of the old common law action on a wager, the wager being on a future event. The dispute meant in sec. 167 is, in my opinion, a dispute upon a question which is fit for the determination of a Court of justice, not a question to be ascertained by perusing the pages of future issues of the *Government Gazette*. Such a fact is one for *constatation*, not judicial decision.

As a further argument, if one is needed, to show that sec. 167 had no application to such a case, Mr. *Mitchell* referred to sec. 226 of the *Customs Act* 1901, which is as follows:—

> "No proceeding whether against an officer or otherwise for anything done for the protection of the revenue in relation to any Tariff or Tariff alteration proposed in Parliament shall except as mentioned in the next section be commenced before the close of the session in which such Tariff or Tariff alteration is proposed."

He contended that this provision, whether valid or not, showed the plain intention of the legislature that questions arising under the unauthorized enforcement of tariff proposals should be held in suspense until Parliament had determined whether it would or would not ratify such enforcement retrospectively, and that such an intention was inconsistent with a provision that an action should be brought with respect to such a matter within six months, a period which might or might not have elapsed before the close of the session. (In the present case it had elapsed, and in the case of the tariff of 1902 there was an interval of eleven months between the proposal and the adoption of the tariff). I think that this argument is well founded, and would, if the matter were otherwise doubtful, be sufficient to show that sec. 167 does not apply to the case.

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I have so far assumed that sec. 167 would, if the case fell within it, afford a defence to the action, that is to say, that the remedy given by that section is exclusive. I must not, however, be understood to express any opinion on that point. I will only point out that the words the "owner may" are *primâ facie* permissive and not, like the words "the owner shall" in the corresponding section of the English *Customs Regulation Act*, peremptory.

The second defence set up by the defendants is based upon sec. 7 of the *Customs Tariff* 1908, which is as follows:—

> "All duties of Customs collected pursuant to any Tariff or Tariff alteration shall be deemed to have been lawfully imposed and collected, and no additional duty shall be payable on any goods on which duty was so collected, merely by reason that the rate at which the duty was so collected is less than the rate of duty applicable to the goods under this Act, and no duty shall be payable in respect of goods delivered for home consumption free of duty pursuant to any Tariff or Tariff alteration."

This section is in terms identical with sec. 6 of the *Customs Tariff* 1902.

Sec. 4 had declared that the time of the imposition of duties imposed by the Act was the 8th August 1907, and that the Act should be deemed to have come into operation at that time. Sec. 5 provides that the duties of Customs specified in Schedule A "are hereby imposed . . . . as from the time of the imposition of such duties" (referring of course to sec. 4) or such later dates as are mentioned in the Schedule in particular cases. This enactment, as already pointed out, created a debt due to the Crown in respect of all duties thus retrospectively imposed.

The term "tariff" is defined by sec. 3 as meaning the Tariff proposed in the Parliament on 8th August 1907, and the term "tariff alteration" as meaning "any alteration of the tariff since proposed in Parliament." The words of sec. 7 "any Tariff or Tariff alteration" are apparently inaccurate. Read literally, the enactment is one of general application, prescribing a rule of law applicable to all future tariffs, and it may have been so intended. But, so read, the provisions of the first limb of the section would

appear to be abnoxious to the rule laid down by sec. 55 of the Constitution which enacts that:—

> "Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect."

I will assume, however, that sec. 7 can be read as if for the words "any Tariff or Tariff alteration" were substituted the words "the Tariff or any Tariff alteration." Accepting this construction, it follows from sec. 55 of the Constitution that the first limb of sec. 7, ending with the words "lawfully imposed and collected," can only have effect given to it on the assumption (1) that it is an enactment imposing taxation; and (2) that the taxation imposed is of duties of Customs.

The plaintiffs contend that this enactment means—with a mere expansion of the words—that in cases in which duties of Customs imposed by the Act had been collected before the Act was passed but after 8th August, in pursuance of a proposal which was before Parliament at the date of the collection, they should be deemed to have been lawfully imposed and collected at that date, as if the Act had then been passed.

The defendants, on the other hand, contend that it means—again expanding the words—that all moneys which had been collected in accordance with a proposed tariff which was before Parliament at the date of collection should be deemed to have been imposed as duties of Customs at that date; or, in other words, that any proposal made to Parliament for the imposition of any duty of Customs should be deemed to have operated as a law imposing the duty as from the date of the proposal, if only the proposed duty had been collected.

The plaintiffs say that there is no justification for substituting the words "All moneys collected" for "Duties of Customs collected." They say further that sec. 6 of the Act of 1902 was construed by this Court in the case of *Cowan & Sons* v. *Lockyer*, (1) and that the legislature, having re-enacted the provision in identical language, must, in accordance with a well known rule, be taken to have accepted that construction.

In *Ex parte Campbell*; *In re Cathcart* (2), *James* L.J. said:—

(1) 1 C.L.R., 460.

(2) L.R. 5 Ch., 703, at p. 706.

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"Where once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts, and the legislature has repeated them without any alteration in a subsequent Statute, I conceive that the legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them." In *Barlow* v. *Teal* (1) Lord *Coleridge* C.J. said:—"Whatever may have been the intention of the legislature we can only decide this case on general principles, and one of those general principles is, that where cases have been decided on particular forms of words, in Courts, and Acts of Parliament use those forms of words which have received judicial construction, in the absence of anything in the Acts showing that the legislature did not mean to use the words in the sense attributed to them by the Courts, the presumption is that Parliament did so use them."

The rule may be called a general principle, or a canon of construction, or a rule of common sense, or a necessary inference of fact.

In *Cowan & Sons* v. *Lockyer* (2), as in this case, the plaintiffs claimed a refundment of moneys which had been demanded and paid pursuant to a proposal which was before Parliament at the date of the payment, but which, as in the present case, had been rejected by Parliament. The defendants relied on sec. 6 as entitling them to retain the money. The plaintiffs had, under the notion (which the Court held to have been mistaken) that sec. 167 of the *Customs Act* 1901 applied to the case, deposited the amount claimed with the Collector. I am sorry to have to quote from my own judgments, but I cannot avoid doing so in order to ascertain whether the Court did construe sec. 6 in the sense in which that phrase is used in the rule or canon of construction relied on.

After pointing out that at the time when the moneys in question had been deposited no duty was by law payable in respect of them, and that the defendants claimed to be entitled to retain the money under sec. 6, which I read, I am reported to have said (3): "The item in question was in the tariff as proposed. It is con-

(1) 15 Q.B.D., 403, at p. 404. (2) 1 C.L.R., 460.
(3) 1 C.L.R., 460, at p. 465.

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

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the collection of money as and for Customs duties, not being Customs duties, but in lieu of them. They must impose them *qua* Customs duties. The legislature deliberately exercised that power in sec. 5 as to the duties mentioned in the Schedule. If sec. 6 receives the construction which will support the defendant's contention, the result will be that the tariff laid on the table of the House of Representatives on 8th October 1901 thereupon became a valid existing tariff, and the duties mentioned in it were thereupon imposed according to it and according to the alterations in it as the tariff was varied from time to time. Mr. *Pigott* admits that he must put his contention as high as that. If that was the intention of the legislature it was a very singular way to express it. I think if the legislature had been invited to pass such a law it would have hesitated to do so."

My brother *O'Connor* is reported to have said (1):—"It is clear, for the reasons the Chief Justice has already given, that, but for sec. 6 of the *Customs Tariff Act* 1902, this money belongs to the plaintiff, and that the defendant as Collector of Customs has no legal right to keep it. But the Collector says that sec. 6 has given him a legal right to keep this money, because it has by retrospective effect made the draft tariff laid before the House of Representatives on the 8th October 1901 the tariff that is to regulate the rights of the parties. The plaintiff, on the other hand, contends that the tariff which is to regulate his rights is the tariff contained in the Schedule to the *Customs Tariff Act* 1902, and to which retrospective effect is given by sec. 5. The question for determination is which of these two contentions is correct.

"The matter all turns upon the meaning of 'collected' in sec. 6. If that word is to be considered as meaning 'collected as and for duty' then it is clear that the section can have no application here, because this money was not paid as and for duty and was therefore not 'collected' in that sense, but was paid as a deposit in order that a dispute about duty could be settled. On the other hand it is contended that 'collected' has a much wider meaning, viz., money gathered in, whether by way of deposit or by way of duty. I am of opinion that sec. 6 cannot be read as

(1) 1 C.L.R., 460, at p. 468.

contended for by the defendant, and for this reason. The plaintiff had a legal right to this money up to the date of the passing of the *Customs Tariff Act* 1902, because up to that date there was no duty legally chargeable on the goods. If sec. 6 is read as contended for by the defendant, the liability of the plaintiff will be determined, not by virtue of the tariff enacted in the Schedule to the *Customs Tariff Act* 1902, but by virtue of the 'draft tariff,' as it is called, which was being acted upon, necessarily without any legal warrant at the time this money was deposited. It is a well known rule in the construction of Acts of Parliament that, where there is a doubt as to the meaning of a word which is grammatically capable of being interpreted either as interfering with an existing right or not, the word will not be construed as having a retrospective effect so as to take away an existing right. If the construction which the plaintiff contends for is placed on this Act, not only is no right taken away, but, it appears to me, the intention of the parties in depositing the money is carried out."

My brother *O'Connor* and I (forming a majority of the whole Bench as then constituted) also held that, having regard to the circumstances attending the payments, the moneys which had been paid in that case did not fall within the meaning of the word "collected" in the phrase "duties of Customs collected" in sec. 6 of the Act.

If the passages which I have read do not constitute an exposition of the meaning of that section I do not understand the meaning of the word. The relevant question for the present argument is whether the enactment was in fact expounded, not whether the exposition was sound, or was absolutely necessary. The defendant in order to support his defence had to maintain successfully two propositions: (1) that the enactment applied to moneys demanded and received under a proposal to impose duties of Customs which was not adopted by Parliament, and (2) that, if it did, the moneys in question had been collected within the meaning of the enactment. The Court might have contented itself with deciding either of these points, but both were argued, and the Court expressed its opinion upon both. This is not an unusual course to adopt. It has sometimes been suggested that

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in such a case the decision is not an authority on either point, since, assuming the decision on either to be good and sufficient to dispose of the case, the decision on the other was unnecessary, and may therefore be regarded as *obiter*. But this notion has no relevancy to the question whether the Court did or did not expound the meaning of the enactment on both points.

In the year 1904 Dr. Wollaston, the Comptroller of Customs, published his book, which was of a semi-official character, and in which he expounded sec. 6 in the same sense.

In 1908 Parliament re-enacted sec. 6 of the Act of 1902 in identical words. I find it impossible to attribute to them an intention to use those words in a different sense, unless, indeed, (perhaps) the construction put on it by this Court was so manifestly absurd that it cannot be supposed that any sensible person would give heed to it. And this is the substantial position which the defendants must take up.

In my opinion this disposes of the case.

But if the matter is to be treated as open to review I adhere to my former opinion, and I will add a few words from that point of view.

The expression "shall be deemed to have been" implies of itself that that which is to be regarded as if it had been the law was not the law at the time spoken of, *i.e.*, the time of collection. The first sentence therefore means "duties of Customs which have been collected shall, although they had not been lawfully imposed at the time of collection, be deemed to have been then lawfully imposed and collected, provided that the collection was in pursuance of the proposed tariff or a tariff alteration."

In my opinion the place of sec. 7 in the scheme of the Act is not that of an independent and cumulative enactment imposing taxation not elsewhere imposed, but that of a subsidiary enactment ancillary to secs. 4 and 5. It is clear that the second and third limbs of the section are of that nature, for the effect of secs. 4 and 5 of the Act without them would have been to create debts to the Crown in respect of all duties which had been retrospectively imposed as from 8th August 1907. This result was not desired, and the second part of sec. 7 accordingly provided that such duties should not be charged unless they had actually been

collected under the authority of the Government. But there were other cases to be dealt with, namely, those in which money had been demanded and collected in pursuance of the proposals that had become law. With respect to them the legal position on the day before the passing of the Act was that the money had been unlawfully demanded and received, and it was desirable, if not absolutely necessary, formally to validate or ratify what had been done in accordance with the expressed will of Parliament. The retrospective operation of the Act would probably have been a bar to an action to recover the money, but it is not so clear that it would have been a bar to an action for damage for unlawful detention. It is not unusual formally to validate retrospectively an act which was unlawful when done, so as to remove all possible consequences of the unlawful act.

This retrospective operation, so far as regards the right to retain moneys collected in respect of duties ultimately approved by Parliament, is a natural and necessary consequence of the parliamentary system, but the extinguishment of a debt due by the Crown in respect of money unlawfully demanded and never made payable by any law is a provision of a very different character, for which no precedent has been found in any English or Australian Statute, and is more like the Oriental mode of raising revenue by seizing property and refusing to return it than the mode usually adopted in British communities. If the words "duties of Customs" are read in their natural sense as meaning duties which have been imposed by law, this provision falls naturally into its place in the Act. If they are read as including moneys which have been demanded and received as and for duties which have admittedly not been imposed otherwise than by the enactment in question, the same words must be construed as both recognizing that the duties have not been and are not to be imposed and as imposing them, which seems a contradiction in terms.

If it be conceded that the term "duties of Customs" is capable, having regard to the context, of the wider meaning, there is at best an ambiguity, and in such a case, as pointed out by my brother *O'Connor* in *Cowan & Sons' Case* (1), the plaintiffs can call in aid both the presumption against a deprivation of vested

(1) 1 C.L.R., 460.

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rights and the rule that the imposition of taxation must be by clear and unambiguous words.

I do not think that the words "duties of Customs collected &c." can be read as synonymous with "all moneys collected in accordance with a proposed tariff," &c. Nor do I think that the words of the enactment are apt to give legal effect to the draft tariff as a retrospective imposition of duties. Such an intention could, and I think would, have been expressed in very different language, especially in view of *Cowan & Sons' Case* (1).

Further: An enactment that a tax which has not been imposed, and which the legislature refuses to impose, shall nevertheless be deemed to have been imposed would not, in my opinion, be the imposition of taxation within the meaning of sec. 55 of the Constitution, but in the nature of an Act of indemnity. As applied to a tax which has been imposed retrospectively it is not open to that objection.

I decline to discuss the question whether such a form of confiscation is justifiable as a matter of policy or morality, or whether the legislature might reasonably have enacted it. Our duty is to interpret, not to make, the law.

It follows that in my opinion the plaintiffs are entitled to judgment for the whole amount claimed.

But, if sec. 7 affords a good defence as regards money collected in pursuance of the draft tariff, it becomes necessary to consider whether the moneys in question were so collected. This depends upon the construction of that document.

Under the tariff of 1902 outside packages in which goods are ordinarily imported were, as already stated, exempt from duty when containing such goods. The packages and their contents were, therefore, regarded as separate entities for the purposes of taxation, as, I believe, they are (and certainly may be) in mercantile usage for the purposes of price. But the defendants rely on sec. 154 of the *Customs Act* 1901, which prescribes that the value of goods subject to *ad valorem* duty shall for the purposes of duty be estimated at their value free on board at the port of export. They contend that the containing packages without which goods could not ordinarily be shipped are to be regarded as accessories

(1) 1 C.L.R., 460.

to the goods themselves, and that their value should consequently be added to and regarded as part of that of the contained goods. It is, *primâ facie*, highly improbable that the legislature should have made the liability to duty of outside packages depend upon the nature of their contents, and still more improbable that they should have made the rate of duty, if any, payable upon them vary according to the duty payable upon those contents, which might be anything from 5 per cent. upwards. In my opinion, however, sec. 154 of the Act of 1901 has no application to the matter. That Act is not a taxing Act, and does not make any goods liable to duty. Sec. 154 merely prescribes a rule for ascertaining the value of goods which are liable to duty, and has nothing to do with the question whether they are or are not liable. And, as I have shown, the tariff of 1902, the proposed tariff of 1907, and the tariff of 1908, all draw a clear distinction between the contained goods and the containing packages. It follows that under the proposed tariff of 1902, in supposed pursuance of which the money now in question was actually collected, the value of the contained goods was to be estimated without regard to the value of the outside packages, and that the liability, if any, of the packages to taxation had to be found elsewhere in the draft tariff.

It is admitted that under the proposed tariff most, if not all, of the outside packages in question would have been taxable as "articles made of wood not elsewhere included," but the duty payable in respect of them as such would have been less than that actually collected by £10, which amount the defendants have paid into Court with a denial of liability. It follows that, whatever the expression "collected pursuant to any Tariff" means in section 7, this amount was wrongly exacted, and that the plaintiffs are, in any view of the case, entitled to recover it in this action.

O'CONNOR J. The *Customs Tariff* 1902, which was the law in force on 8th August 1907, expressly exempted from duty "outside packages, n.e.i., in which goods are ordinarily imported." The Customs tariff proposed in Parliament on that date repeated that provision, but added the qualification that the exemption was not

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to apply to outside packages containing goods subject to *ad valorem* duty. In accordance with well known constitutional usage, duties were collected under the proposed tariff at once, it being customary when the tariff is later on embodied in a Statute to make it retrospective and impose the duties as from the date of the proposal. While the duties were thus being collected without statutory authority the Collector demanded from the plaintiffs and was paid by them without protest duties on the outside packages in which certain *ad valorem* goods were imported. The *Customs Tariff* 1908, which finally embodied the proposed tariff, modified the provisions as to outside packages by making all outside packages free of duty, and that modification related back to the day when collections under the proposed tariff were first made. The plaintiffs afterwards demanded back from the Collector the moneys so paid as and for duties on the outside packages, and the demand not being complied with the present action was brought. It cannot be, of course, contended that there was any legal authority for collecting the duties at the time they were paid. Neither the tariff embodied in the Act of 1902 nor that embodied in the Act of 1908 made those particular duties at any time payable. But the defendants contend on several grounds that the moneys claimed having been paid by the plaintiffs as and for Customs duties cannot now be recovered back.

The first ground is taken that the payment was voluntary. In one sense it was. It was in fact made without protest and in the ordinary course of Customs business.

But it was paid with the knowledge on both sides that Customs control over goods imported may be exercised in support of illegal as well as of legal demands of duty. The principle of law applicable in such cases is well recognized. Where an officer of Government in the exercise of his office obtains payment of moneys as and for a charge which the law enables him to demand and enforce, such moneys may be recovered back from him if it should afterwards turn out that they were not legally payable even though no protest was made or question raised at the time of payment. Payments thus demanded *colore officii* are regarded by the law as being made under duress. The principle laid down

in *Morgan* v. *Palmer* (1), *Steele* v. *Williams* (2), and adopted in *Hooper* v. *Exeter Corporation* (3) clearly establish that proposition. But it is contended by the defendants that sec. 167 of the *Customs Act* 1901 prevents the application of the principle to moneys collected without legal authority as and for duties of Customs. That section, it is said, gives the importer an opportunity of obtaining his goods without making an irrevocable payment of the duty claimed, and if he chooses not to avail himself of the opportunity, his payment of duty, it is argued, cannot be regarded as made under duress. Assuming that the section is applicable to moneys collected as and for duties under a proposed tariff, a matter which in the view I take of the effect of the section it is unnecessary at present to decide, the alternative offered to the importer does not in my opinion affect the applicability of the principle. The Collector has the power to keep the goods under Customs control until the importer either pays the duty or takes the advantage of the section. The latter he can do only by depositing with the Collector the whole amount of the duty. He may, it is true, exercise his free will as to which of these courses he shall adopt. But there is a compulsion to adopt one or the other, and whichever course he may take he cannot obtain possession of his goods without handing over to the Collector either absolutely or conditionally the amount claimed as duty. It was also argued by the defendants that the *Customs Act* 1901, having provided in sec. 167 a method of recovering back moneys paid under an illegal demand of duty, had in effect enacted that that and no other method could be followed, and had thereby deprived the importer of the right to question his liability in any other way. For this position *Sargood* v. *The Queen* (4) was relied on. But that decision is based entirely on the wording of secs. 21 and 22 of the Victorian *Customs Act* 1857. By the former, corresponding generally with sec. 165 of the Commonwealth *Customs Act* 1901, the adoption by the importer of the method prescribed is compulsory, not optional as under sec. 165, and sec. 22, for which no corresponding section is to be found in the Commonwealth *Customs Act* 1901, makes its plain that the procedure under sec. 21 was intended by

(1) 2 B. & C., 729.
(2) 8 Ex., 625.
(3) 56 L.J.Q.B., 457.
(4) 4 V.L.R. (L.), 389.

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the legislature to be the only permissible and the final method of dealing with questions of disputed duty. The decision is therefore in no way applicable to the present case. For these reasons I am of opinion that the moneys paid as and for Customs duties were collected *colore officii* and were not mere voluntary payments, and that the plaintiffs would have the right, unless it has been taken away by the *Customs Tariff* 1908, to recover them from the defendants.

The *Customs Tariff* 1908, which repeals the Act of 1902, embodies in Schedule A the proposed tariff in the shape finally approved by Parliament. By the operation of secs. 4 and 5 the duties set forth in the Schedule are declared to have been in force from the date when collections under the proposed tariff were first made. Under Schedule A there is no duty on the outside packages of *ad valorem* goods. On the contrary, there is an express exemption from duty as in the Act of 1902 of all outside packages in which goods are ordinarily imported. If the rights of the parties in this case are to be regulated as the plaintiffs contend they must be by secs. 4 and 5, the moneys which the plaintiffs now seek to recover, having been collected by the Customs Department without any authority, would now be recoverable as moneys illegally collected *colore officii*. The defendants' case, however, is that the duties having been collected pursuant to the proposed tariff the rights of the parties are not regulated by those sections but by sec. 7 which they contend is a complete answer to the action.

The plaintiffs answer that sec. 5 in making Schedule A retrospective has expressed the clear intention of the legislature that the duties embodied in the Schedule should be deemed to be the only duties legally payable on goods imported after the proposed tariff was first brought into operation, and that to read sec. 7 as the defendants contend would be to take away rights of action properly vested in persons from whom moneys had been exacted by the Collector in respect of duties not authorized by the Schedule. They further contend that a meaning may fairly be given to sec. 7 which would not have that effect, and which would be consistent with the intention of the legislature as expressed in sec. 5 to ratify and legalize the proposed tariff only in so far

as it is embodied in Schedule A. The defendants' contention in reply is that the legislature has in sec. 7 expressed its intention so clearly to treat all duties collected under the proposed tariff as closed transactions that no other course is open to the Court than to give effect to that intention. Sec. 7 enacts as follows :— "All duties of Customs collected pursuant to any Tariff or Tariff alteration shall be deemed to have been lawfully imposed and collected, and no additional duty shall be payable on any goods on which duty was so collected, merely by reason that the rate at which the duty was so collected is less than the rate of duty applicable to the goods under this Act, and no duty shall be payable in respect of goods delivered for home consumption free of duty pursuant to any Tariff or Tariff alteration." It is a well recognized rule in the interpretation of Statutes that an Act will never be construed as taking away an existing right unless its language is reasonably capable of no other construction. On the other hand, it must never be forgotten that rules of interpretation are formulated for the purpose of aiding the Court in ascertaining the intention of the legislature from the language it has used. This Court has on many occasions laid down and acted upon principles of interpretation applicable in this case. In the *State of Tasmania* v. *The Commonwealth* (1) the learned Chief Justice adopted the following statement from the judgment of Lord Chief Justice *Tindal* in the *Sussex Peerage Case* (2) :—"My Lords, the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the Statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such a case best declare the intention of the law-giver." In the same case Mr. Justice *Barton* (3) adopted the following passage from the judgment of *Jervis* C.J. in *Abley* v. *Dale* (4) :—"We assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence

(1) 1 C.L.R., 329, at p. 339.
(2) 11 Cl. & F., 85, at p. 143.
(3) 1 C.L.R., 329, at p. 346.
(4) 20 L.J.C.P., 233, at p. 235.

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to their literal meaning." In my judgment in the same case (1) I adopt the following statement from the judgment of *Pollock* C.B. in *Miller* v. *Salomons* (2):—"If," he says, "the meaning of the language be plain and clear, we have nothing to do but to obey it—to administer it as we find it; and, I think, to take a different course is to abandon the office of Judge, and to assume the province of legislation."

In the light of these principles I now turn to the Statute to be interpreted. Its purpose, and the sole purpose to which by reason of sec. 55 of the Constitution it can be directed, is the imposition of the Customs duties set forth in Schedule A prospectively and retrospectively. The Act was assented to on 12th December 1908 and the duties in Schedule A were imposed as and from 9th August 1907, the date on which collections under the proposed tariff began. If the latter had been approved without alteration nothing more would have been necessary than to enact it with retrospective operation from the date last mentioned. But in the intervening four months of parliamentary discussion various amendments were adopted so that when the Act was passed the duties as finally approved and embodied in the Schedule differed in many instances from the duties actually collected during that period. If the Act had done no more than make Schedule A retrospective there would necessarily accrue claims by importers against the Collector for over-payments and claims by the Collector against the importers for under-payments. Wherever duties have been collected under similar circumstances the same position has necessarily arisen. In Australia before Federation it had been differently dealt with by different Parliaments in different Colonies. Generally the Collector and the importer were left to enforce by the ordinary processes of law their respective rights as declared by the tariff finally enacted. But in some cases Parliament in respect of duties collected imposed the duties retrospectively as collected, making a rough and ready adjustment of rights by enabling the Customs Department to retain moneys collected in excess of the rates as enacted, and on the other hand relieving importers from further liability where the amount collected fell short of those rates. The latter course was taken

(1) 1 C.L.R., 329, at p. 359. (2) 7 Ex., 475, at p. 560.

by the Federal Parliament in the imposition of its first tariff by the Act of 1902, and the provisions of that Act have been repeated in the Act of 1908 in language substantially identical. Sec. 5 operating retrospectively applies on the face of it to all Customs duties embodied in the Schedule whether collected or not collected at the time when the Act was passed, and if it stood alone the plaintiffs would be entitled, as I have pointed out, to recover from the defendants moneys collected as and for Customs duties but which would not be payable under Schedule A. But sec. 7 puts duties collected pursuant to the proposed tariff in a different category from those not collected. Its object is clearly to put an end to all questions as to the legality or sufficiency of payments made as and for duties of Customs under the proposed tariff. This object it has effected in language which appears to me clear and precise by enacting that the duties as collected shall be taken to have been lawfully imposed and collected at the time when they were collected, that where the amount collected was lower than that fixed by Schedule A the difference shall not be payable by the importer, and that where under the proposed tariff goods have been delivered for home consumption duty free no duty shall be payable under the Schedule. It was contended on behalf of the plaintiffs that the expression "duties of Customs" in the beginning of the section is ambiguous, that though it is capable of meaning duties which though not legally imposed were collected as and for duties legally imposed, its ordinary and natural meaning is "duties of Customs authorized by law." It is further contended that, construing it in the latter sense, it becomes consistent with sec. 5 and with the preservation of the plaintiffs' vested rights. There is, in my opinion, no ground for the assumption that the ordinary and natural meaning of the words by themselves is that which the plaintiffs seek to attribute to them. They are just two ordinary English words, the meaning of which will vary according to the context in which they are found. In sec. 5, for instance, the context shows that they must have been used in the sense of Customs duties legally imposed. But throughout the *Customs Act* 1901 there are sections in which the word "duty" or "Customs duty" is used to describe moneys which the Customs authorities are authorized to collect as and for Customs duties at a time when

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the legality or illegality of the duty as charged cannot in the nature of things be determined. Having regard to the context in which the words "duties of Customs" stand in sec. 7, it seems to me impossible to give effect to the whole section unless they are read as meaning duties collected as and for Customs duties, whether authorized by law or not. The terms "tariff" and "tariff alteration" are defined by sec. 3 to mean the proposed tariff and the alteration made in it before it became law. Duties of Customs collected pursuant to a proposed tariff must therefore, on the face of the language used, mean Customs duties collected before there was in existence any Act authorizing their collection. It is equally apparent from the rest of the section that it is dealing with moneys collected as and for Customs duties, and not with collections of Customs duties legally imposed. Having regard to these considerations, that is therefore, in my opinion, the meaning which the expression "duties of Customs" must bear in sec. 7.

However for the purpose of testing the plaintiffs' other contention I shall assume that there is an ambiguity, that the narrower meaning for which the plaintiffs contend may be attributed to the expression. If sec. 7 is so read the first portion of it does no more than legalize the imposition and collection of the duties set forth in Schedule A. But that has been already done by sec. 5 which imposes the duties in Schedule A retrospectively, and declares them to have been in force from a date antecedent to collection. The duties being thus made lawful, it necessarily follows that the collection of them would be lawful. That being so, there was no need to further legalize their imposition or their collection. The first part of sec. 7 would thus become on that reading superfluous. It will not be assumed unless some very strong ground for the assumption can be shown that the legislature intended merely to repeat in the first part of sec. 7 what it had already enacted in sec. 5. Some other meaning must be found for the first part of sec. 7 if we are to give any real effect to its language. What the real meaning is becomes abundantly clear if the section is regarded as a proviso to sec. 5. So regarded it deals in a special way with duties actually collected, imposing them retrospectively not as set forth in the Schedule, but at the

rate of the actual collections. Taking that view of the section no more is necessary than to read its words in their ordinary natural meaning. In my opinion the language of the section is clear and precise, and so construed it expresses the intention of the legislature to legalize retrospectively all payments of Customs duties collected pursuant to the proposed tariff. The Court is bound to give effect to the intention which the legislature has so clearly expressed, even though the enactment as so interpreted may deprive importers, who have paid duties not legalized by the Schedule, of their right to dispute their liability.

A further contention as to the interpretation of the section was as raised by the plaintiffs. The body of the Act of 1908 repeats the Act of 1902—secs. 4, 5, and 6 of the latter being substantially identical with secs. 4, 5, and 7 of the former. In the interval between the passing of the two Acts this Court had occasion to interpret sec. 6 of the Act of 1902. The appellants contend that the interpretation then placed upon that section must now be placed on sec. 7 of the Act of 1908, because the legislature in passing the latter must be taken to have enacted it with the meaning which the Court put upon the language of its counterpart in the Act of 1902. The rule of construction applicable in such cases is well established, and is thus stated by *James* L.J. in *Ex parte Campbell*; *In re Cathcart* (1):—"Where once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts, and the legislature has repeated them without any alteration in a subsequent Statute, I conceive that the legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them." In *Cowan & Sons* v. *Lockyer* (2), which is the case relied on by the appellants, the Court was constituted by my learned brother the Chief Justice and myself. Liability to pay Customs duty demanded under the then proposed tariff had been disputed by the importers, and the amount claimed by the Collector had been deposited with him under circumstances which the Court held amounted to an agreement that it should be held pending the determination by the Court of the question of liability. The importers claimed that their rights

(1) L.R. 5 Ch., 703, at p. 706. (2) 1 C.L.R., 460.

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depended on the terms of the tariff as embodied in the Act. The defendant's case was that the moneys sought to be recovered were duties of Customs collected pursuant to the proposed tariff, and that the duty as collected must in accordance with sec. 6 be deemed to have been legally imposed and collected. The Court held that the section did not apply in the circumstances which had arisen, the duties not having been "collected" within the meaning of the section but merely deposited in terms of the agreement. The only portion of the section interpreted was the word "collected." Both Judges referred to the rule of interpretation that a Statute will not be construed so as to take away a vested right if any other meaning can be reasonably given to its language, and both applied it in construing the only word in the section as to the meaning of which any question was raised or discussed, namely, the word "collected." The learned Chief Justice expressed an opinion as to the retrospective effect of the section, but the inapplicability of the word "collected" to the circumstances of the case was, as I read the judgment, the effective ground of his decision. His concluding words are these (1)—"For these reasons I have come to the conclusion that the word 'collected' ought not to be held applicable to, or to include, money deposited under an agreement that if it is not legally payable it will be returned. I therefore think that the plaintiff is entitled to judgment for the amount claimed and interest thereon at 5 per cent. per annum, with costs of the action."

The following passage from my judgment (2) states the only question which it appears I set before myself for determination:— "It is clear, for reasons the Chief Justice has already given, that, but for sec. 6 of the *Customs Tariff Act* 1902, this money belongs to the plaintiff, and that the defendant as Collector of Customs has no legal right to keep it. But the Collector says that sec. 6 has given him a legal right to keep this money, because it has by retrospective effect made the draft tariff laid before the House of Representatives on the 8th October 1901 the tariff that is to regulate the rights of the parties. The plaintiff, on the other hand, contends that the tariff which is to regulate his rights is the tariff contained in the Schedule to the *Customs Tariff Act*

(1) 1 C.L.R., 460, at p, 467. (2) 1 C.L.R., 460, at p. 468.

1902, and to which retrospective effect is given by sec. 5. The question for determination is which of these two contentions is correct.

"The matter all turns upon the meaning of 'collected' in sec. 6. If that word is to be considered as meaning 'collected as and for duty' then it is clear that the section can have no application here, because this money was not paid as and for duty and was therefore not 'collected' in that sense, but was paid as a deposit in order that a dispute about duty could be settled. On the other hand it is contended that 'collected' has a much wider meaning, viz., money gathered in, whether by way of deposit or of duty. I am of opinion that sec. 6 cannot be read as contended for by the defendant, and for this reason." The judgments must be read with reference to the facts with which the Court was dealing, and the one ground of decision common to both judgments, as I read them, and certainly the only ground stated in my judgment as the reason of my decision is that the word "collected" in sec. 6 was not applicable to the circumstances in which the moneys were deposited. I agree that in the application of the rule the legislature will not be deemed to have investigated what was or was not necessary for determination of the issue to be decided, nor is the rule restricted to such interpretations only as were essential for settling the rights of the parties in the particular case. The judgment of the Court must be taken as a whole, and the interpretation upon which it has chosen to base its decision will be taken to have been adopted by the legislature in any subsequent enactment of the same provision. Applying these principles in the broadest way to the decision under consideration I can find in it no other ground for the conclusion arrived at than that which is based on the interpretation of the word "collected." That word in sec. 7 must therefore be taken to have been re-enacted with the meaning which the Court attributed to it in sec. 6 of the Act 1902. No wider effect can, in my opinion, be given to the judgment in *Cowan & Sons* v. *Lockyer* (1).

The plaintiffs further relied upon the contention that the amount in dispute had not been collected "pursuant to the pro-

(1) 1 C.L.R., 460

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posed Tariff" inasmuch as the latter properly construed did not purport to impose a duty on the outside packages in which goods subject to *ad valorem* duty were ordinarily imported. The contention is not in my opinion sustainable. Sec. 7 of the *Customs Tariff* 1908 by its retrospective imposition of the duties as collected puts Customs duties under the proposed tariff on the same footing as if they had been authorized by Statute at the time of collection, and for the purpose of ascertaining the amount of duty payable the proposed tariff must be read in conjunction with sec. 154 of the *Customs Act* 1901 just as an ordinary tariff would be read if the duties were being collected under normal conditions and under a Statute in force at the time of collection. In the case of goods subject to *ad valorem* duty the valuation of the goods for the purposes of duty must by that section be taken to include every accessory of the goods necessary to place them free on board at the port of export. The outside package is clearly an accessory necessary for that purpose: for that purpose it is part of the goods, and its value must be included in their value. In imposing a duty on the goods, therefore, the legislature has imposed a duty on the outside package in which they are delivered on board at the port of export. The scheme of the *Customs Tariff* 1902, as well as that of the Act of 1908, is to recognize outside packages as so included. Otherwise it would be unnecessary to expressly exempt them from duty as has been done in both those tariffs. The proposed tariff followed the same plan, and in expressly excepting from the general exemption of outside packages from duty those in which goods subject to *ad valorem* duty were ordinarily imported it indicated, in my opinion, a clear intention that that particular class of outside package should be charged with duty as being an accessory to the dutiable goods which it contained. Holding that view it is unnecessary for me to refer to the alternative rate of duty mentioned in the defendants' amended defence. For these reasons I am of opinion that the duties in question were collected pursuant to the proposed tariff within the meaning of sec. 7 of the Act of 1908, that they must therefore be taken to have been legally collected, and that the plaintiffs' action to recover the moneys paid in respect of them cannot be maintained.

ISAACS J. The plaintiffs' claim is simple. They say, to begin with, that the moneys sued for were paid as duty claimed under a tariff proposal that never became law, and as the payments were demanded, backed by the power to detain the goods until compliance, it was involuntary and therefore recoverable. Next they assert that in any event the moneys were not collected in accordance with that proposal. The defendants have a twofold answer in common; they allege the payment has since been strictly clothed with the force of legal obligation as a duty of Customs; and further that the payment was voluntary. There are some additional considerations in respect of the defendant Smart which require separate attention.

The defendants rely for their first answer upon the initial provision in sec. 7 of the *Customs Tariff* 1908. To this the plaintiffs reply that that provision was not intended as an imposition of duties, but merely as a statutory protection to officers for collecting before the passing of the Act the moneys not made legal duties by Schedule A. And that is the question to be answered on this branch of the case. But for the fact that the learned Chief Justice holds a contrary opinion, I should find it difficult to perceive any doubt that when the legislature used the word "imposed" they meant just what they said. It is an apt and precise word, and it conforms to the expression "imposing taxation" in secs. 53 and 55 of the Constitution. And I have felt greatly tempted to leave the matter there. But the contentions have been so earnestly pressed by learned counsel, and present features of such grave importance not merely to the present plaintiffs and those now in like situation, but in relation to the general community, and even the powers of Parliament itself, that on the whole I conceive it to be my duty to state explicitly why I am constrained to reject them.

Learned counsel for the plaintiffs supported his view of the provision referred to on these grounds:—(1) That "duties of Customs" in sec. 7 mean what the law regards as duties, and therefore must be confined to Schedule A; (2) that if payments outside those authorized by Schedule A were to be regarded as duties by law, there would be an inconsistency between secs. 7 and 5; (3) that such imposition would be a confiscation because

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it took away vested rights, and that cannot be supposed; (4) that Parliament having declared the duties in Schedule A, and those only, to be the tariff, it would be unconstitutional to attempt to legalize other demands, admittedly unlawful, as if they too were part of the tariff; (5) that if such were attempted there would also be a violation of the uniformity provisions of the Constitution; and (6) that in view of the decision in *Cowan & Sons* v. *Lockyer* (1), the legislature must be taken, in enacting sec. 7, to have meant that it did not impose any tariff beyond Schedule A. When the Act of 1908 is read by the light of practical necessities of Government, recognized by the practice in England and her self-governing dominions, and there is applied to its interpretation one familiar principle of the law of agency to which I shall presently advert, it seems to me the suggested difficulties vanish. On 8th August 1907 a Customs and Excise tariff was proposed in Parliament, which being only in the shape of a resolution could validly be presented in a combined form. It ran thus:—"That *duties of Customs* and *duties of Excise* be imposed according to the following Tariff," &c. In accordance with well established practice, the officers of the Customs Department, from that moment and—what is the key of the whole situation—*acting professedly for and on behalf and in the name of the Commonwealth*, entirely disregarded the then existing tariff of 1902 and collected, as if already fully authorized, what were called in the tariff proposal, and universally spoken of, as "Duties of Customs," as set forth in the parliamentary proposal and at that time not yet clothed with the sanction of a law.

At a later date, 12th December 1907, another proposal was made in Parliament (though it was obviously not the only other one) modifying the first, and thenceforth the Customs officers followed the modified scheme. The result of the deliberations in Parliament was that Act No. 7 of 1908 was passed, by which as a standing Customs tariff Schedule A was enacted. This was effected by sec. 5, which I think may be taken as adopting by way of a general scheme the various proposals made in and modified by Parliament itself. But there still remained possible considerations of importance not so far met by sec. 5. Large

(1) 1 C.L.R., 460.

quantities of goods had been entered for home consumption under rates not included in the Schedule, and had passed into actual consumption. In some cases duties had been paid upon them in excess of Schedule rates, in still others they had been admitted free. Disturbance of these matters after the lapse of many months presents features of complication and obvious injustice of a greater or less degree, which a legislature may or may not consider proper to permit.

In Canada, for instance, the *Customs Tariff* 1897 (60 & 61 Vict. c. 16) sec. 21, after enacting practically what is contained in secs 4 and 5 of our own Act, had provided for the contingencies referred to by a proviso in the section itself. The Commonwealth Parliament, if its language receives its apparent meaning, has in like manner provided for them in the separate section 7. In the Canadian Act, it will be observed, the moneys conserved by the proviso are designated as "duty" and the expression "duties of Customs" is also employed with reference to the resolutions which there correspond with the tariff proposals in the Commonwealth Act. It is true that the one Act is no authority for the construction of the other, but when it is contended that a direction to retain moneys paid as duties in the circumstances specified is not to be imputed to Parliament because it must be regarded as simple confiscation, it is valuable to know that the Dominion Parliament in 1897 did not so regard it, but adopted the very scheme which is covered by the primary import of the words of the Act now under consideration and is contended for by the Crown. That scheme is as follows:—Section 4 declares the time of "imposition of the Duties of Customs imposed by this Act" to be 8th August 1907 at four o'clock Victorian time; that is the time of the imposition of *all* the duties imposed by the whole Act. Section 5 carefully limits its provisions to some only of the duties. It deals solely with what it expressly terms "The Duties of Customs specified in Schedule A," and of all *these* it says they "are hereby imposed in accordance with Schedule A," which in the Act is called "the Customs Tariff," as distinguished from "Tariff" or "Tariff Alteration." Section 7, on the other hand, refers to quite another class of duties of Customs, namely, those "collected pursuant to any Tariff or Tariff Alteration."

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That means, pursuant to any proposal, considered as a proposal and nothing more except for the legal force now about to be given to it by sec. 7 itself. Reference therefore being made to the proposal of 8th August 1907, one must turn to it to find what is meant by the "Duties of Customs" spoken of in that connection; and there as already stated we do find the very expression "Duties of Customs." So that what the proposal calls "Duties of Customs," and the moneys that were collected under it, although it does not for the purpose, down to the end of sec. 6, become more than a tariff, within the meaning of sec. 3, are identical with the things section 7 refers to by the same appellation. And as to these that section enacts that they "shall be deemed to have been lawfully imposed and collected."

Section 7 in itself is a complete regulation with respect to goods that have gone into consumption on the faith of a proposal which, though not legalized in Schedule A, was nevertheless acted on by the Executive with the knowledge and tacit approbation of Parliament. It provides for all such cases a quieting doctrine, on the principle *quod fieri non debet factum valet*, and it applies the doctrine impartially to Crown and subject alike. Regarding sec. 7 as a special provision for special circumstances entirely outside Schedule A, and to that extent in the nature of a proviso to sec 5, there is no inconsistency in the Act.

But, say the plaintiffs, there remain the objection of interference with vested rights which affect the construction, and also the constitutional objections, which are insuperable obstacles of law.

But there is one governing idea relevant to the case, already alluded to, that at once dissolves the difficulties. It is the well known and elementary rule, established as early as 1302 in *Year Book* 30 Edw. I. p. 126, and recognized by the Privy Council in *Irvine* v. *Union Bank of Australia* (1), that enables a person to ratify the acts of his professing agent. I regard that rule as the touchstone of this case in its main aspect. Sec. 7 is a plain application of the rule by Parliament to the practical exigencies of the situation.

It will tend to make the matter clear if I recall the proposition in the classical words of *Tindal* C.J. in *Wilson* v. *Tumman* (2):

(1) 2 App. Cas., 366.

(2) 6 M. & G., at 236, p. 242.

—"That an act done, *for another*, by a person, not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or on a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his *previous* authority." This has received the sanction of the House of Lords in *Keighley, Maxsted & Co.* v. *Durant* (1). To see how that rule applies to the present case we have to recollect that the Commonwealth Parliament had full powers to impose Customs duties in advance as it pleased provided it did not offend against any of the prohibitions of the Constitution; and I may state at this point, I can see no want of uniformity in the only sense pertinent, namely, discrimination between States and parts of States. Further, the retroactive imposition of duties is equally competent to the Parliament: *Colonial Sugar Refining Co. Ltd.* v. *Irving* (2). Consequently when the Customs officers, *professedly acting for the Commonwealth*, made collections as upon the basis of certain tariff proposals, it was perfectly competent to the Commonwealth to adopt their acts, and by the regular process of parliamentary ratification—the only appropriate method of Commonwealth action in that regard—to place itself in precisely the same position as if its command had been previously given. Not only does this apply to sec. 5 which is the Customs tariff proper; it also applies with equal cogency to sec. 7, which is not what is technically called "the Customs Tariff," but is confined to the specific acts therein mentioned. The principle I have referred to therefore entirely dissipates the notion that Parliament was vainly attempting to legalize an invalid Act; it was adopting, upon a principle thoroughly established by common law, the act of the Executive in collecting moneys as Customs duties, and once that was ratified and the moneys declared to be duties of Customs, they became such in law as fully as if their collection had been originally authorized. The same consideration with equal certainty ends the discussion

(1) (1901) A.C., 240, at p. 246. (2) (1906) A.C., 360.

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as to vested rights. The contention was that a day before the Act was passed there was a right to recover back the money, and this was a vested right which required more explicit language to destroy.

If sec. 226 of the Act of 1901 has the force contended for by the plaintiffs, and applies until the end of the session to restrain an action to recover back duties illegally demanded, that right of course did not exist in full force, but was held in abeyance to await parliamentary determination, and in this way the section seriously weakens, if it does not altogether destroy, the vested right argument. A vested right means really a right existing which under the law as it stands is perfect, unchallengeable, and indefeasible. But even apart from sec. 226 the right though existing was not indefeasible, for no man has a vested right to immunity from taxation; it was from the very moment the moneys were collected subject to divestiture on acknowledged legal grounds. When the Crown servants on behalf of the Commonwealth collected the money, though without actual authority, the right to recover back the money was from that moment subject to the possible adoption of the exactions by Parliament. That possibility is recognized by the Court, which would ordinarily stay an action brought in the meantime. And when the possible divestitive event happens, the contemplated condition arises which terminates the so-called vested right, and terminates it in a regular and lawful manner, just as any private citizen may, by adopting his professing agent's act, forever destroy the right equally vested in another person to recover from the hitherto unauthorized agent. Though in ordinary instances arising in the course of litigation the principle adverted to would instantly suggest itself in an appropriate case, English law does not usually present an occasion where it is required to be applied to the act of a legislative body.

In England, in Canada, and in the Australian States no such question could arise as is agitated here, because in those jurisdictions the Parliament has or had full power to condone such an act admittedly illegal without constituting it an imposition of duties. The very fact, however, that under the Federal Constitution (sec. 55) an attempt by the legislature to effect such an end

in an Act for the imposition of taxation would be futile, is an extremely strong reason for not adopting that construction if the words are reasonably open to another interpretation which will make them a valid exercise of power. Very late instances of the way in which Courts will so consider a Statute are *New York Central and Hudson River Railroad Co.* v. *United States* (1), and *El Paso and Northeastern Railway Co.* v. *Gutierrez* (2). The United States is the only jurisdiction where considerations in respect of condonation of illegal acts could arise similar to those which present themselves in the Commonwealth, and it is satisfactory to me to have found since the close of the argument a decision in 1906 of the American Supreme Court: *United States* v. *Heinszen & Co.* (3), in which the simple principle of ratification was acted upon as the basis of a judgment exactly in point.

Duties of Customs during 1900, 1901 and up to March 1902, when Congress passed a prospective Tariff Act, were illegally collected in Porto Rico solely under presidential authority.

The importers sued to recover back the moneys they were compelled to pay. At the time of action brought, and for some time afterwards, there had been no attempted ratification by Congress. The case therefore raised in an acute form the question of vested right as well as illegality. In June 1906, that is to say over four years after the goods had been actually imported, Congress passed an Act providing, with respect to the illegal exactions, that they "are hereby legalized and ratified and the collection of all such duties prior to March eight, nineteen hundred and two is hereby legalized and ratified and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed."

The desirability of definitely settling this question of constitutional power once and for all leads me to quote some passages from the judgment. After stating the ordinary rule as to ratification, and that it is elementary, the Court says (4):—"That the power of ratification as to matters within their authority may be exercised by Congress, State Governments or municipal corporations, is also elementary," and instances are given. From one of

(1) 212 U.S., 481, at p. 497.
(2) 215 U.S., 87, at pp. 96 and 97.
(3) 206 U.S., 370.
(4) 206 U.S., 370, at p. 382.

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them the following citation is made (1):—"And the ratification, if made, was equivalent to an original authority, according to the maxim, '*Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.*'"

Again (2) this pregnant passage occurs:—"Although the duties were illegally exacted the illegality was not the result of an inherent want of power in the United States to have authorized the imposition of the duties, but simply arose from the failure to delegate to the official the authority essential to give immediate validity to his conduct in enforcing the payment of the duties."

"On its very face the Act is but an exercise of the conceded power dependent upon the law of agency to ratify an act done on behalf of the United States which the United States could have originally authorized" (3).

Coming to the question of vested right, the claimants there had not only begun their action before the validating Act was passed, but they also relied on the Fifth Amendment, a position stronger than anything pleadable here. So potent, however, is the principle of ratification running through the case that both these circumstances were ineffectual. Said the Court (3):—"It is said that the money paid to discharge the illegally exacted duties after payment, as before, 'justly and equitably belonged' to the claimants, and that the title thereto continued in them as a vested right of property. It is consequently insisted that the right to recover the money could not be taken away without violating the Fifth Amendment, as stated. But here, again, the argument disregards the fact that when the duties were illegally exacted in the name of the United States Congress possessed the power to have authorized their imposition in the mode in which they were enforced, and hence from the very moment of collection a right in Congress to ratify the transaction, if it saw fit to do so, was engendered. In other words, as a necessary result of the power to ratify, it followed that the right to recover the duties in question was subject to the exercise by Congress of its undoubted power to ratify." Further: "But if it be conceded that the claim to a return of the moneys paid in discharge of the exacted

(1) 206 U.S., 370, at p. 384. (2) 206 U.S., 370, at p. 385.
(3) 206 U.S., 370, at p. 386.

duties was in a sense a vested right, it in principle, as we have already observed, would be but the character of right referred to by *Kent* in his *Commentaries*, where, in treating of the validity of Statutes retroactively operating on certain classes of rights, it is said (vol. II., pp. 415, 416):—'The legal rights affected in those cases by the Statutes were deemed to have been vested subject to the equity existing against them, and which the Statutes recognized and enforced.'"

And again (1): "'Nor is it important, in any of the cases to which we have referred, that the legislative Act, which cures the irregularity, defect or want of original authority, was passed after suit brought, in which such irregularity or defect became matter of importance. The bringing of suits vests in a party no right to a particular decision,' . . . and 'his case must be determined on the law as it stands, not when the suit was brought, but when the judgment is rendered.'" The Court therefore reversed the judgment of the Court of Claims (2).

I next have to consider the argument that, whatever might have been the true construction and effect of sec. 7 if the matter were *res nova*, the decision in *Cowan & Sons* v. *Lockyer* (3) put an interpretation upon a precisely similar section favourable to the plaintiffs, and its re-enactment amounts to a legislative adoption of the earlier curial interpretation. As an argument that is, of course, quite sound; but a sufficient answer, in my opinion, to its application to the present case is that the only question which arose for decision in *Cowan & Sons' Case* (3) was whether "collected" in sec. 6 of the Act of 1902 (sec. 7 of the Act of 1908) included a case where the importer declined to pay the duties demanded, and instead of that deposited the amount as a stake or security to abide the legal determination of the question in dispute. No doubt, opinions were expressed by the learned Chief Justice to a certain extent favourable to the views now urged on behalf of the plaintiffs as to the deprivation of a vested right (4) and as to the non-imposition of duties by sec. 6 (5). But though these were expressions of opinion of great weight and authority, I am

(1) 206 U.S., 370, at p. 387.
(2) 42 C. of C. Rep., p. 58.
(3) 1 C.L.R., 460.
(4) 1 C.L.R., 460, at p. 466.
(5) 1 C.L.R., 460, at p. 467.

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unable to see they were of such a nature as to control the true meaning of the very plain words of the legislature relevant to this contention. With regard to the vested right there is nothing to exclude the qualifications to which I have alluded, and which are necessarily involved in ratification. The one point which would stand forth and claim the attention of the legislature is the decision that the word "collected" meant "paid as for duty"; and consequently, in re-enacting that word, Parliament cannot be supposed to have done more than rest content with the conclusion arrived at. If the legislature, finding that word so interpreted, and desiring to retain it, wished to negative the idea of vested right as a mere reason for a correct conclusion, what could it have done? A declaration that the right previously existing should not be deemed a vested right would have been as futile as I think it was unnecessary.

Then with respect to the non-imposition of duties by sec. 6, taken in conjunction with the Crown's argument in *Cowan & Sons' Case* (1) that, payment or non-payment so long as the moneys were in fact handed to the Collector whether as deposit or otherwise, the duties were imposed, the opinion referred to may I think be taken simply to negative such a contention. And that view is not even now controverted. The imposition by ratification under the present sec. 7 only takes place provided the duties were "collected," that is "paid." So understood, I perceive no difficulty in reconciling the observations of the learned Chief Justice with what I have considered the primary meaning of the section. On the whole I am unable to see how the legislature can be taken to have put any meaning on sec. 7 that the identical words had not in the previous Act, or to have done more than tacitly acknowledge its contentment with the interpretation put upon the word "collected." The plaintiffs' contention upon sec. 7 as applied to the facts is that the duties were not collected pursuant to the proposal of August 1907, because the woollen goods were valued so as to include the value of the outside packages. The first reason given is that sec. 154 of the *Customs Act* 1901, bringing in the words "free on board," does not apply to the case of moneys collected under a mere tariff proposal, but

(1) 1 C.L.R., 460.

only to those collected under an existing Statute. But the foundation of the argument fails. By sec. 10 of the Act of 1908, the former Tariff Act (No. 14 of 1902) is repealed as from 8th August 1907; and by sec. 4 the later Act from that time onwards is deemed to take its place. Consequently, as sec. 7 is, for the reasons already stated, an enactment of actual imposition of taxation where the duties have been actually collected, and as by sec. 2 that enactment is in force from 8th August 1907 to June 3 1908 the actual date of the Royal assent, it follows that the the collection in this case must be taken to have been made under a valid law. The *Customs Act* 1901 is in itself a standing provision, and is in fact acted upon by the Customs authorities during the pendency of and with reference to a proposed tariff, subject to ratification which in this instance has taken place, and is so acted on not only with respect to the actual collection, but also as to the mode of calculating values.

If the tariff were to be read as imposing a duty simply *ad valorem* without any standard of reaching that value, that would mean according to the value on arrival, which would hardly assist the plaintiffs.

The question then is whether, in calculating the value of the goods contained in the packages, the Crown can properly take into consideration the value of the packages themselves.

I assent to the proposition that in arriving at the value of their contents the packages are not to be charged for as independent articles, viz. packages. Such articles are expressly mentioned as dutiable in the tariff and they may appropriately be separately charged for, unless exempted. For instance, they may arrive empty, or containing free goods or goods of less value than the packages themselves, and section 138 of the *Customs Act* 1901 enables the Crown to charge the higher duty. But, though not to be appraised as separate and independent merchandise, and their value then simply added to the value of the contents independently ascertained, and the duty struck on the total as if the whole were contents simply, they may, and in many cases must, enter into the calculation as an integral factor in arriving at the value of the goods they contain. Goods "free on board" have as such a greater value than goods in the warehouse because

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of the extra charges for services to place them on board in a fit condition for export. The foreign vendor of goods will of course charge a higher price for them, if he has to deliver them free on board, than if the purchaser takes delivery in the warehouse. But that is because the vendor does not fulfil his contract unless he puts them in a condition to travel, which may necessitate a sound package and the cost of packing them, nor unless he transports them to the wharf, and thence to the ship. His price for the goods covers all this, however the items composing it are specifically enumerated. English authorities are not available, but American cases are. And although the legislation is not in the same terms, some of the decisions, as *Belcher* v. *Linn* (1) decided in 1860, cover the principle. From the report of the preceding case in that volume it appears that to the value of the foreign goods at the place of manufacture the law required to be added, in order to ascertain their value on shipboard, "all costs and charges except insurance," including commissions.

As to the word "charges," *Clifford* J. in *Belcher* v. *Linn* (2) said:—"The better opinion is, we think, that charges include in general the value of the sack, package, box, crate, barrel, hogshead, bale, cask, all outside coverings belonging to the merchant, or, so to speak, the integument of the importation, and that the value of the same, to be estimated at the usual cost to the importer, should properly be added to the actual market value or wholesale price of the importation, in order to ascertain the true basis on which to assess the duty."

In 1869 the learned Judge determined in the same way the case of *Harding* v. *Whitney* (3), where the text of the section is given.

If we consider the case of such things as ales and spirits, or chloroform, or any chemical gas imported, it is practically impossible to consider the goods apart from the protective covering.

Every point raised by the plaintiffs upon the main question, whether or not they paid more than the law required, has therefore failed.

Then as to the Crown's second line of defence, which in the

(1) 24 How., 533.
(2) 24 How., 533, at p. 535.
(3) 4 Cliff., 96; Federal case, 6052.

circumstances it is necessary as well as desirable to determine, namely, that the payment was voluntary. In my opinion it was, and on this ground alone I should be prepared to decide against the plaintiffs. I am inclined to think this part of the case is of greater practical importance to the revenue and to the mercantile community generally than the other, because this question may arise at any moment in the ordinary Customs administration; the other only during a tariff discussion. Here we are again confronted with elementary principles. Apart from sec. 167 of the *Customs Act* 1901 there is no doubt a payment might be held to be compulsive. The Customs held the goods, and laying aside sec. 167, unless the duties demanded by the officers are paid, the goods in case of dispute would not be delivered. That would be a clear case of compulsion, and the importers on showing excess could recover it. But sec. 167 must be reckoned with, and Mr. *Mitchell* did not contend that if it were in force for the purpose, it would not afford an answer to him. But he strenuously argued it was not in force, inasmuch as it applies only to existing duties and not to mere tariff proposals.

The first inquiry then is whether the section must be considered as in force when these duties were collected. I cannot understand why it is less so than any other section in Part VIII. The reasons I have already stated for considering the *Tariff Act* 1908 in force as from 8th August 1907 repel the arguments that sec. 167 cannot be applied to what is merely a draft tariff, because in the eye of the law as the Court must now administer it: *Warne* v. *Beresford* (1); and *Ponnamma* v. *Arumogam* (2), in obedience to the competent declaration of Parliament, the *Customs Tariff* 1908, enacting as law the tariff proposal of 8th August 1907 to the extent of actual collections, was in operation at all times material. The limitation of six months in the section itself does not detract from that because, in my view, the dispute must be with regard to the construction of the tariff treating it as law, and so long as that is understood to be the only question raised there is no reason whatever why such a case cannot be determined by the Court at once. I do not think a case of that kind falls within sec. 226, which is aimed at preventing proceedings

(1) 2 M. & W., 848.

(2) (1905) A.C., 383, at p. 390.

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based on the sole fact that a proposed tariff is not yet passed into law. The limitation in sec. 167 is to enable the Court to put an end to uncertainty which points to interpretation; the prohibition in sec. 226 is to preserve the existing status until Parliament itself ends the uncertainty, which involves new legislation. My view on this point is that there is an implied agreement when the money is paid that if the proposed tariff shall not eventually become law all the money collected in pursuance of it shall be returned. It may be that sec. 226 compels an importer to wait for this purpose until the close of the session. But putting that aside, legal construction of the tariff as proposed is as open during the session as after—and the real operation of sec. 167 is not a matter of necessary delay. Rather the opposite. The Commonwealth for obvious reasons, concerning both its own finances and those of the States, needs to know within a reasonable time—fixed at six months—whether the duties in the particular case are to be challenged or not. So the matter presents itself to me looking at the two Acts separately.

In addition, however, sec. 2 of the Act of 1908 expressly incorporates the *Customs Act* 1901, and this is necessary for some legitimate purposes of definition and interpretation as, for instance, the relevant words "*ad valorem*" and "entered."

Sec. 167 of the Act of 1901 is also, in my opinion, a section of a character not inappropriately included in a Tariff Act, and in fact it declares what in certain events shall be deemed to be the proper duty.

In force of sec. 2 whether regarded as a direct enactment as from 8th August 1907, of sec. 167 in connection with the whole of the Act of 1908, or as a plain manifestation of Parliament's intention that it was proper to act on the whole of the Act of 1901 pending enactment of the tariff proposals, it seems to me to leave no foothold whatever for the objection as to the applicability of sec. 167.

Accepting the legal operation of sec. 167 it can, of course, be applied only where the merchant disputes amount, rate, or liability. It is a section for the relief of importers, and to enable them to obtain their goods without payment of duties they dispute. Where they do not dispute the claim they need no

protection in respect of the true construction of the tariff. The law says, in effect, to an importer "If you dispute liability, or amount, or rate, you are not forced to pay the Crown in order to get your goods. You may if you choose get immediate possession of them without payment to the Crown, by merely depositing the money with a stakeholder, and may try the validity of the demand giving security in the meantime to pay it, should it be found lawful." If an importer deliberately elects, in the face of such an intimation, to pay at once, and finally close the transaction, having the means of avoiding it, it is hard to detect any element of compulsion upon him to make the payment to the Crown. Can the money paid in such circumstances nevertheless be recovered back as extorted *colore officii* within the meaning of *Steele* v. *Williams* (1)? In my opinion clearly not. The right to recovery after a demand *colore officii* rests upon the assumption that the position occupied by the defendant creates virtual compulsion, where it conveys to the person paying the knowledge or belief that he has no means of escape from payment strictly so called if he wishes to avert injury to or deprivation of some right to which he is entitled without such payment. The nature of an involuntary payment was stated with respect to carriers under statutory liability—and is equally appropriate here—by Lord Chelmsford with the concurrence of Lords Colonsay and Cairns, in *Great Western Railway Co.* v. *Sutton* (2); and again in *Lancashire and Yorkshire Railway Co.* v. *Gidlow* (3). The essence of the statement is the inability to obtain, otherwise than by absolute payment, those services which the recipient is bound to render without it. But if the person paying has an obvious means within reach of avoiding payment without sacrificing any right, then, if he elects to pay instead of adopting the alternative course, he cannot afterward aver coercion into payment. This principle has been applied in several jurisdictions. In England the following are instances where the principle has been enforced either to granting or refusing relief:—*Morgan* v. *Palmer* (4); *Knibbs* v. *Hall* (5); and

(1) 8 Ex., 625.
(2) L.R. 4 H.L., 226, at p. 263.
(3) L.R. 7 H.L., 517, at p. 527.
(4) 2 B. & C., 729.
(5) 1 Esp., 84.

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its converse *Hills* v. *Street* (1); *William Whiteley Ltd.* v. *The King* (2), in which *Steele* v. *Williams* (3) and *Hooper* v. *Exeter Corporation* (4) were cited. In Victoria: *Kelly* v. *The King* (5); in New South Wales: *Keogh* v. *Styles* (6) in New Zealand: *The King* v. *Bannatyne & Co.* (7), particularly at p. 248; and in America the following cases are very distinct:—*Preston* v. *Boston* (8), by *Shaw* C.J.; *Elliott* v. *Swartwout* (9); *Irvin* v. *Schell* (10); *Swift Co.* v. *United States* (11), and *Chesebrough* v. *United States* (12). The last mentioned case, decided in 1903, contains (13) a lucid statement by *Fuller* C.J. of the law as applicable to taxation, and it will be found that the cases I have cited and those quoted in them afford numerous instances of voluntary payments of Customs duties, demanded by the officers, but not recoverable back because the law allowed to the importer another method of testing the legality of the charge without detention of the goods. *Page on Contracts*, pp. 1253, 1254 summarizes the effect of the American decisions in terms which agree with what I have stated.

It is simply the equivocal use of the expression *colore officii* which is liable to confuse. It is an ambiguous term, sometimes meaning done in pursuance of an office, and so as to prevent recovery, as in *Irving* v. *Wilson* (14); and sometimes so as to make the money recoverable as suggested in *Steele* v. *Williams* (3). In the extorsive sense it is used in its worst aspect, and as opposed to *virtute officii*. Authorities relevant to this are *Alcock* v. *Andrews* (15); *Dive* v. *Maningham* (16), and *Dalton on Justices*, p. 117; and *Burrall* v. *Acker* (17). Here there was no act done or threat held out to coerce the plaintiffs into payment, nothing to weaken the alternative mode expressly provided by Parliament, and well known to the importers, for the very purpose of avoiding final payment if they desired to dispute their liability.

(1) 5 Bing., 37.
(2) 101 L.T., 741.
(3) 8 Ex., 625.
(4) 56 L.J.Q.B., 457.
(5) 27 V.L.R., 522; 23 A.L.T., 214.
(6) 2 S.C.R. (N.S.W.), 167.
(7) 20 N.Z.L.R., 232.
(8) 12 Pickering (Mass.), 7, at p. 14.
(9) 10 Pet., 137.
(10) 5 Blatch., 157; Federal case, 7072.
(11) 111 U.S., 22, at pp. 29, 30.
(12) 192 U.S., 253.
(13) 192 U.S., 253, at p. 259.
(14) 4 T.R., 485, *per Grose* J.
(15) 2 Esp., 542 (*n*).
(16) 1 Plowd., 60, at p. 68.
(17) 23 Wendell (N.Y.), 606.

No case has been brought to the notice of the Court showing that, if any other mode of obtaining the goods was open, the mere demand of duty constituted a compulsory demand *colore officii* entitling them to claim restitution.

Such a doctrine, it is evident, would throw the finances of the country into utter confusion. After several years questions might be raised which, on some suddenly discovered interpretation of a taxing Act, whether internal revenue or Customs, would unexpectedly require the return of enormous sums of money, and quite disorganize the public treasury. Indeed, it reduces sec. 167 to a dead letter, depriving it of all efficacy whatsoever. No merchant, so long as such a position prevails, would be foolish enough to raise a dispute and act under a section which requires him to sue within six months, when by deliberately preserving silence he can sue within at least six years.

This ends the controversy so far as the general defences are concerned. In one aspect it is unnecessary to say anything about the separate liability of the individual defendant, but there is an objection in the face of the proceedings that the Court, I think, is bound to notice. If regarded as sued only officially, the action against the individual defendant is not maintainable, because Government revenue cannot be reached by a suit against a public officer in his official capacity (*Palmer* v. *Hutchinson* (1)), unless, of course, some statutory provision should allow it: *Bainbridge* v. *Postmaster-General* (2). No such provision exists here with respect to this defendant.

As to his personal liability, it is important in the public interest that officers should not stand in unnecessary fear of personal liability for merely doing their ordinary duty. The action for money had and received lies, says Lord *Mansfield* in *Moses* v. *Macferlan* (3), "only for money which, *ex æquo et bono*, the defendant ought to refund," and among other things enumerated by that learned Judge it lies for extortion; the gist of the action being, as he states, "that the defendant, upon the circumstances of the case, is *obliged by the ties of natural justice and equity to refund* the money."

(1) 6 App. Cas., 619, at p. 626. (2) (1906) 1 K.B., 178, at p. 190.
(3) 2 Burr., 1005, at p. 1012.

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Now, there was no dispute whatever in the present case, and assuming that the individual defendant personally received the money, it was handed to him without any intimation that the payment was objected to, or notice to retain it; and as he made no threat and committed no act to coerce the plaintiffs into paying the amount at the peril of detention of their goods, he did not obtain the money extorsively (*per Parke* B. in *Steele* v. *Williams* (1)).

The money was handed to him, therefore, for the Crown (see *In re Nathan* (2)), and he was impliedly empowered by the plaintiffs to do with it what an officer in his position would be expected to do in the ordinary course of his duty, that is, pay it over to the Treasury, which we must assume he did in accordance with the *Audit Act* 1901, sec. 22. In the circumstances, the principles on which the action for money had and received is founded have no application to him, and he cannot be sued: *Greenway* v. *Hurd* (3); *Taylor* v. *Metropolitan Railway Co.* (4); *Elliott* v. *Swartwout* (5); *Bannatyne & Co.* v. *Carter* (6).

For all these reasons I am of opinion the defendants are entitled to judgment.

HIGGINS J. Personally, I should prefer to confine my judgment to sec. 7 of the *Customs Tariff* 1908. The other subjects discussed are not substantially necessary for our decision, and there is danger of dealing with them with relaxed attention. But, as my learned colleagues think it to be desirable to pronounce upon the other subjects, I shall state my opinion.

As for sec. 7 of the *Customs Tariff* 1908, I can hardly conceive of clearer language to express an intention that whatever had been done as to the collection of duties pursuant to the tariff proposed in Parliament on 8th August 1907 should be validated. Sec. 5 has stated the broad, general rule—that the duties in the Schedule should be deemed to have been imposed on 8th August 1907, or at such later dates as were mentioned in the Schedule. This would leave the final decision of Parliament, after the tariff debate, operative on goods as from 8th August 1907, or from

(1) 22 L.J. Ex., 225, at p. 226.
(2) 12 Q.B.D., 461, at p. 472.
(3) 4 T.R., 553.
(4) (1906) 2 K.B., 55, at p. 62.
(5) 10 Pet., 137, at p. 153.
(6) 19 N.Z.L.R., 482.

such later date, &c. But in the meantime, in accordance with the usual practice, duties are paid on any goods imported at the rates prescribed by the proposed tariff. In most cases, by the time that the tariff has been enacted, the goods have passed into circulation with the duty added. The purchasers from the importers have paid on the basis of this duty; and they will not be indemnified if the duty, not being sanctioned by the Act, be refunded to the importer. Sec. 7, accordingly, says in effect—Let bygones be bygones. If duties have been collected under tariff resolutions not finally sanctioned by Parliament, they may be retained by the Crown. On the other hand, if no duty, or too little duty, has been paid—if the Act impose a duty which was not in the proposed tariff, or if it increase a proposed duty—let things remain as they are. "All duties of Customs *collected* pursuant to any Tariff or Tariff alteration shall be deemed to have been lawfully *imposed* and collected." "Duties of Customs" here cannot mean lawful duties of Customs. This would render the section objectless, unmeaning. What is the use of enacting that "all *lawful* duties of Customs collected" &c. "shall be deemed to have been *lawfully* imposed"? It is clear that the words here mean money collected as duties of Customs; in the same sense as the word "duty" is used in sec. 163 of the *Customs Act* 1901. That Act is incorporated with this Act, and is to be read with it (sec. 2). I cannot accept any of the subtle suggestions for the interpretation of these simple words. We have been reminded of the doctrine that Parliament is to be presumed not to intend to interfere with vested rights. But, in applying this principle, we should bear in mind the nature of the legislation which we have to consider. It is a Customs tariff, legislation in which it is the invariable and necessary practice to interfere with vested rights, to validate past unlawful collections, to make retrospective laws. We have also been reminded of the fact that a decision was given by two of the members of this Court in 1904 in a case in which reference was made to the corresponding sec. 6 of the *Customs Tariff* 1902 (*Cowan & Sons* v. *Lockyer* (1)); and it is argued that the legislature, in re-enacting the same words in sec. 7 of the *Customs Tariff* 1908, must be taken to

(1) 1 C.L.R., 460.

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have used them with the meaning which the Court had judicially expressed. The principle invoked by this argument is well established—as a presumption, not as a rule of law. It cannot with safety be applied unless the decision of the Court has turned definitely and unequivocally on the alleged interpretation of the Act. Both of my learned brethren, in *Cowan & Sons* v. *Lockyer* (1), though they followed independent lines of reasoning, concurred as to the meaning of the word "collected" in sec. 6 (the present sec. 7). They held that it did not include money deposited on the analogy of sec. 167 of the *Customs Act* 1901; and this finding was sufficient to settle the case, and did settle it. This was the authoritative interpretation. The case related to a state of things which was fast passing away—the state of things before the first Commonwealth tariff; and it seems to me to be unreasonable to treat Parliament as accepting as an authoritative interpretation another expression of opinion which has to be gleaned only by careful perusal of one of the judgments, and which is not vital to the decision.

But the question arises, what duty did the proposed tariff of 8th August 1907 purport to impose on outside packages? It is admitted that these packages are made of wood, and that they contained goods subject to an *ad valorem* duty (woollens, &c.). The proposed tariff prescribed that "outside packages n.e.i., in which goods other than those subject to an *ad valorem* duty are ordinarily imported when containing goods" should be "free." This form of words indicates that packages containing goods subject to an *ad valorem* duty were not to come within "free" goods; but it does not indicate what the duty (if any) on the packages was to be. It is said that sec. 154 (*a*) of the *Customs Act* 1901 compels us to treat the value of these packages as part of the value of the goods which they contain—in other words, that sec. 154 taxes these packages, and on the basis of the woollens or other contents. Now, this Act—the *Customs Act* 1901—is not a taxing Act at all. Looking through its Divisions and its Headings, it is clear that it is a machinery Act for the regulation of the Customs administration under any tariff that might be imposed. Sec. 154, in particular, is merely a provision

(1) 1 C.L.R., 460.

for the valuation of goods which are to pay duty according to their value: "When any duty is imposed according to value," &c. It provides that the value to be taken is the "fair market value" of the goods, that is, the particular dutiable goods mentioned, *e.g.*, (woollens) in the country of export it is to be the "fair market value" (of the woollens imported) in the usual and ordinary commercial acceptation of the term, and "free on board" at the port of export with a further addition of 10 per cent. on such market value. What is the meaning of "free on board"? Does it mean more than that the market value of the goods is to be ascertained on the hypothesis that they were put on board the ship with all such charges paid as were necessary for the purpose of bringing them—*those very goods in their packages*—to the hold of the ship? I can find no indication of any intention to bring under the *ad valorem* duty goods other than those which Parliament in its Customs tariff has specified; and Parliament has actually treated packages as being distinctive goods, separate from their contents for purposes of duty, in the *Customs Tariff* 1902, in the proposed tariff of 8th August 1907, and in the *Customs Tariff* 1908. It may also be fairly urged that the expense of making the wooden cases and packing therein ought rather to be treated as an expense incidental to the voyage from the port of export, and as covered by the 10 per cent. provision, not as an expense incidental to the bringing of the goods to the hold. Such packages would not have been necessary but for the voyage—would not have been necessary if the ship were the ultimate destination. In the case of a tariff so elaborate and discriminative for purposes of protection, it would seem absurd to make the same kind of package pay (say) 40 per cent. if it carry woollen goods, and 5 per cent. if it carry cotton. I shall not refer to questions which might be raised, under sec. 55 of the Constitution, if this sec. 154 is to be treated as imposing taxation on packages. But I think that we should approach the question in that frame of mind which is appropriate with regard to sections which are said to impose taxation, and should insist on a strict construction in favour of His Majesty's subjects. My opinion concurs on this point with that of the Chief Justice, that the claim under the sec. 154 should fail. I may point out also

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that, if it is sec. 154 that makes duty payable on the packages, if the duty has been collected pursuant to sec. 154, then the Crown is not protected from liability to refund by sec. 7 of the *Customs Tariff* 1908; for the duty has not been collected "pursuant to any Tariff or Tariff alteration." This alleged duty was not part of the tariff proposed in Parliament on 8th August 1907; and the fact that the *Customs Act* 1901 is incorporated with and read as one with the *Customs Tariff* 1908 does not alter this fact, however it may affect the construction and the application of provisions. If my view of sec. 154 is right, the plaintiffs do not, in the present case, take much advantage; for they become liable under item 306A of Division XVI. of the proposed tariff to pay nearly as much duty as for articles of wood n.e.i., and would only be entitled to recover from the defendants, out of the £10 paid into Court, the difference between the true duty on articles of wood n.e.i. and the sum of £188 8s.

But even this insignificant gain does not accrue to the plaintiffs if they have no right to bring the action. In the first place, I am clearly of opinion that sec. 167 does not apply to this case. For no "dispute" arose in fact "as to the amount or rate of duty, or as to the liability of goods to duty." What happened was that plaintiffs paid the money under the proposed tariff in the belief that duty on *ad valorem* packages would be imposed, retrospectively, by Parliament (see letter of 10th May 1909); and it is clear, on the admissions at the trial, that the plaintiffs could not have got the goods unless they paid the duty claimed. They paid without disputing; and, even if it could be said that they disputed, they did not dispute on either of the two subjects mentioned in sec. 167—(*a*) is any duty payable? (*b*) how much? So the money could not have been deposited under sec. 167, *on the facts*.

In the second place, the question arises, if sec. 167 does not apply, have the plaintiffs any remedy against the Commonwealth for the money wrongly collected?

This is the part of the case that has caused me most perplexity. In the first place, this action—for money had and received—rests on implied contract, on a fiction of law that the defendants promised to return what they ought not to retain. If the matter

were between subject and subject, I think that the fiction of law and the obligation to repay would arise here, under the circumstances, on the principle stated in *Atlee* v. *Backhouse* (1). I cannot regard the payment as a voluntary payment. The plaintiffs had to pay or they might lose their market. But the Crown is not bound by fictions or implications: see *per Molesworth* J., *Lorimer* v. *Reg.* (2); *Sheffield* v. *Ratcliffe* (3); *Sir Edward Coke's Case* (4); *Chitty's Prerogative*, p. 381; and see *Théberge* v. *Laudry* (5). In short, this claim being made against the Commonwealth in contract, it may turn out that the Commonwealth—the Crown in its Commonwealth capacity—made no contract. But relief has been given by the Privy Council against the Crown on such feigned promises. The point was not argued: see *Blackmore* v. *North Australian Co.* (6). It is quite possible that the Governments in question did not wish to take the point, and instructed their counsel to that effect. But the decisions distinctly cover all the ground. The judgment would be wrong if the point were right. Under these circumstances, I think that it is my duty to treat the point as settled against the Crown.

In the second place, the phraseology of sec. 56 of the *Judiciary Act* 1903 is such as to make it very doubtful whether it does more than allow "the Commonwealth" to be named as defendant instead of a person nominated by the Governor-General under the *Claims against the Commonwealth Act* 1902. That Act was repealed by sec. 3 of the *Judiciary Act* 1903. The phrasing of sec. 56 is peculiar. It does not say that any person may make any claim against the Commonwealth in contract or in tort; it only says that any person making a claim in contract or in tort may bring his action *against the Commonwealth*. The words used would seem at first sight to leave the rights to bring claims in contract or in tort to other legislation, and merely to prescribe the form of the action. For this Act is a machinery and procedure Act, not an Act conferring substantive rights. I find, however, that in *Baume* v. *The Commonwealth* (7) it was held

(1) 3 M. & W., 633.
(2) 1 W. & W. (L.), 244. at p. 247.
(3) Jenk., 286, at p. 287; Hob., 334, at p. 339.
(4) Godb., 289, at p. 299.
(5) 2 App. Cas,, 102.
(6) L.R. 5, P.C., 24, at pp. 40 and 44.
(7) 4 C.L.R., 97.

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that by virtue merely of the *Judiciary Act* 1903 an action for tort could be entertained against the Commonwealth. The particular point to which I have referred was not taken by counsel for the Commonwealth in that case; nevertheless, although the difficulty was not discussed, there is no doubt that the judgment covers the ground. But what turns the scale in my mind is a consideration of the words of sec. 64. Sec. 56 having dealt with the form of the suit, sec. 64 says that in the suit "*judgment may be given* . . . . on either side, *as in a suit between subject and subject.*" These words cannot be satisfied, to the full extent of their meaning, unless the judgment which could be given against a private person under similar legal relations can be given against the Crown. For this reason, and because the point has not been argued on behalf of the Crown, I am not prepared to dissent from the view that the action lies.

I think I ought to add that the action does not lie against the co-defendant Smart. It is true that his counsel admits that, if an action does not lie against the Commonwealth, it lies against Smart, the Collector, but I cannot accept this admission on a matter of law. Mr. Smart does not represent the Commonwealth. There is no Act in existence allowing his name to be used to represent the Commonwealth. If judgment went against Mr. Smart in these proceedings, execution would have to be levied on his private goods. Then, if we look at Mr. Smart in his private capacity, he is not liable for the moneys had and received. A mere agent, collecting by his principal's authority, and paying over—with the knowledge and consent of the plaintiff—to his principal, cannot be made liable for money had and received. The payment made by the plaintiff was made in reality to the Crown and not to Smart: *Bamford* v. *Shuttleworth* (1); *Owen & Co.* v. *Cronk* (2); and if any action can be brought it must be brought against the Crown. I am speaking of a debt, not of a tort, an action for money had and received by the Crown, not a wrongful trespass by the Crown's servant.

For the reasons which I have given I am of opinion that the plaintiffs should not recover more than the £10 paid into Court.

(1) 11 A. & E., 926.

(2) (1895) 1 Q.B., 265, at p. 274.

Judgment for the defendants. The £10 paid into Court to be paid out to the plaintiffs. No costs of the reference.

Solicitors, for the plaintiffs, *Braham & Pirani.*

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

B. L.

[HIGH COURT OF AUSTRALIA.]

THE AUSTRALIAN BOOT TRADE EMPLOYÉS' FEDERATION . . . . . } CLAIMANTS;

AND

WHYBROW & CO. AND OTHERS . . RESPONDENTS.

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MELBOURNE, *Sept.* 19, 20, 21; *Oct.* 10.

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

Constitutional law—Powers of the Commonwealth—"Conciliation and Arbitration for the prevention and settlement of industrial disputes"—Common rule—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 51 (*xxxv.*), (*xxxix.*)—*Commonwealth Conciliation and Arbitration Act* 1904-1910 (*No.* 13 *of* 1904, *No.* 7 *of* 1910), *secs.* 19, 38 (*f*), (*g*).

The provisions of the *Commonwealth Conciliation and Arbitration Act* 1904-1910, which purport to authorize the Commonwealth Court of Conciliation and Arbitration to declare a common rule in any particular industry, and direct that the common rule so declared shall be binding upon the persons engaged in that industry, are *ultra vires* the Parliament of the Commonwealth and invalid.

CASE stated by the President of the Commonwealth Court of Conciliation and Arbitration.

On a plaint brought in the Commonwealth Court of Conciliation and Arbitration by the Australian Boot Trade Employés