

[HIGH COURT OF AUSTRALIA.]

MILLS (COLLECTOR OF CUSTOMS FOR NEW } PLAINTIFF;  
SOUTH WALES) . . . . . }

AND

PARKES AND ANOTHER . . . . . DEFENDANTS.

MILLS (COLLECTOR OF CUSTOMS FOR NEW } PLAINTIFF;  
SOUTH WALES) . . . . . }

AND

PARKES . . . . . DEFENDANT.

*Customs—Customs security—Loss of goods upon wharf—Unavoidable accident—* H. C. OF A.  
*Burden of proof—Customs Act 1901 (No. 6 of 1901), secs. 42, 44, 48.* 1914.

The defendants, one of whom, P., was the agent of a certain ship, entered into a Customs security by which they acknowledged themselves bound to the Customs in the sum of £500 subject to certain conditions, one being that if goods discharged from any ship of which P. was agent should be safely and securely kept on a sufferance wharf or in a shed thereon and there preserved in good state and condition free from all loss or damage, save such as might arise from unavoidable accident, and another that if the duty due or to accrue due on such goods should be paid or the goods be exported, the security should be discharged. Certain goods were landed on a sufferance wharf from a ship of which P. was agent, and then disappeared, there being no evidence to show how.

SYDNEY,  
May 21.  
Gavan Duffy JJ.

*Held*, that the onus lay upon the defendants of proving that the loss of the goods arose through unavoidable accident, and that in the absence of such proof, the duty not having been paid, the defendants were liable in an action upon the security.



## H. C. OF A. SPECIAL CASE.

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Two actions were brought in the High Court by Stephen Mills, the Collector of Customs for New South Wales—one (1913, No. 7) against George Arthur Parkes and the Queensland Insurance Co. Ltd. to recover the sum of £500 being the stated liability of the defendants jointly and severally as subscribers to a Customs security dated 12th August 1910, given by the defendants pursuant to the *Customs Act* 1901, and the other (1913, No. 8) against George Arthur Parkes to recover the sum of £68 12s., alleged to be due for duties of Customs in respect of certain tobacco imported into the Commonwealth at Sydney in the s.s. *Birkenfels*, of which goods the defendant was alleged to be the owner within the meaning of the *Customs Act* 1901-1910.

The Customs security was as follows:—"By this security the subscribers are, pursuant to the *Customs Act* 1901, bound to the Customs of the Commonwealth of Australia in the sum of £500 sterling subject only to these conditions: that if all goods discharged from any vessel belonging to or under charter to George Arthur Parkes or of which said vessel the said George Arthur Parkes acts as agent, or over which he exercises control or power of disposition, which goods are deposited upon any sufferance wharf in Port Jackson in the State of New South Wales or in any store or shed situate upon any such sufferance wharf without payment of duty, shall while they shall be and remain upon any such wharf or in any such store or shed be safely and securely kept upon any such wharf or in any such store or shed, and there be preserved in good state and condition by the said George Arthur Parkes or his agents free from all loss, deficiency or damage, save such as may arise from unavoidable accident, and also if in all cases the duties due or to accrue due upon such goods shall be paid or the same shall be duly exported according to the first account taken of such goods upon the landing of the same and without abatement on account of deficiency, except as is otherwise provided by law, and further if no part of the goods so from time to time to be deposited and kept upon any such wharf or in any such store or shed as aforesaid shall be taken out of any such store or shed until cleared therein by due entry and payment of duties of



Customs or upon due entry for warehousing or for exportation, and also if the said goods shall be disposed of or accounted for to the satisfaction of the officer of Customs, subject to such Regulations as are now or at any time or from time to time hereafter may be approved of before the above conditions are complied with, then this security shall be thereby discharged.”

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The parties concurred in stating the questions of law arising in the actions in a special case for the opinion of the Full Court of the High Court which after setting out the above stated facts was, so far as material, as follows :—

5. The said Customs security is hereby put in suit by the Collector and shall be deemed for the purposes of this special case to have been produced to the Court. The above-named defendants, the said George Arthur Parkes and the said Queensland Insurance Co. Ltd., duly executed the same on 12th August 1910.

6. The s.s. *Birkenfels*, a vessel trading between New York in the United States of America and Australia, arrived in the port of Sydney on 20th October 1912, and on or about the said last-mentioned date was berthed at Nos. 3 and 4 Cowper's Wharf, Woolloomooloo, a sufferance wharf duly appointed under the provisions of the *Customs Act* 1901.

7. On 21st October 1912 the defendant George Arthur Parkes, as the agent for such vessel, applied for the issue of a Collector's permit, and such permit was in fact issued. The said vessel was reported at 9.30 a.m. on the said 21st October 1912.

8. On the said 21st October 1912 the defendant George Arthur Parkes, as such agent as aforesaid, applied for permission to work overtime, and such application was duly granted. No tobacco was landed from the said vessel before or after Customs hours.

9. Pursuant to the Collector's permit mentioned in paragraph 7 hereof, the discharge of the cargo of the said vessel, before the report thereof or the passing of Customs entries, was proceeded with; and on 26th October 1912 *inter alia* two packages of manufactured tobacco included in the inward report or manifest of the said vessel, and which had been imported into Australia by the said vessel, were unshipped from the said vessel and landed



H. C. OF A. directly at the said wharf and placed in a shed on the said  
1914. wharf.

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MILLS 10. Under the *Customs Tariff* 1908-1911 the said tobacco was  
v. dutiable upon importation, and according to all the accounts  
PARKES. taken thereof upon landing or otherwise the amount of duty  
— payable thereon was £68 12s.

11. The said wharf and the shed or sheds thereon are vested in the Sydney Harbour Trust Commissioners, and the usual course of procedure by a ship's agent to obtain the use of a wharf and the shed or sheds thereon and the usual course of procedure in regard to the landing and disposal of imported goods from the vessel (which was the course of procedure followed with regard to the goods in question in this case) is as follows:—

Shortly before a vessel arrives her agent (the defendant Parkes in this case) arranges with the Harbour Trust Commissioners what berth is to be allotted to the arriving vessel. The Harbour Trust authorities notify the Customs officer in charge of the wharf accordingly that the berth has been allotted. Suitable office accommodation for the exclusive use of the Customs officer employed at the wharf and the requisite shed accommodation for the protection of goods as prescribed by the *Customs Act* 1901 are provided on the said wharf, also an office for the ship's delivery clerk. Both the office of the Customs officer and of the delivery clerk are outside the shed. This clerk is engaged on behalf of the ship by the ship's agent, and is paid by him out of the moneys supplied by the ship. The ship's agent having notified the Harbour Trust authorities that the ship will be ready to commence discharging at a certain time on a certain date, the Harbour Trust's wharfinger sees that the wharf is clear and the shed or sheds ready to receive cargo. Then, when permission has been given by the Customs officer in charge of the wharf for the vessel to commence to discharge, the sheds are opened by the Harbour Trust's wharfinger, who hands the keys to the ship's delivery clerk. The keys of the shed are then held by the ship's delivery clerk during such time in each day as the cargo is being delivered, and as soon as work ceases for each day the shed or sheds are locked up by him and the keys are handed over to the Customs officer in charge of the wharf, and obtained from him



each morning by the ship's delivery clerk. It is the duty of the Customs officer on the wharf to see that the sheds are securely locked when the cargo is not being delivered, and if he is not satisfied that the cargo is secure he can require the attendance of further Customs officers to watch the cargo, whose services are paid for by the ship's agent to the Department out of the moneys provided by the ship. Should the ship work overtime the Customs officer must be notified and must remain on the wharf during the time such overtime is being worked in order to protect the revenue. Customs officials do not handle the cargo at any stage and do not tally the cargo out from the ship. The ship's agent pays to the Harbour Trust Commissioners on behalf of the said ship tonnage dues varying according to the time the ship's berth is used by the ship, and the consignee of the cargo pays to the Harbour Trust Commissioners wharfage at the rate of 2s. 6d. per ton net on all cargo landed at the wharf, which is a fixed rate not varying according to the time the wharf is used. For the purpose of storing and unloading cargo the tonnage dues cover the use of the adjacent wharf and shed or sheds thereon, but not to the exclusion of any other persons who may be authorized by the Harbour Trust Commissioners to use the same. In order to obtain delivery of such cargo the consignee satisfies the ship's agent by the presentation of the bill of lading that he is entitled to the goods and gets a delivery order; he then satisfies the Customs officer in charge of the wharf that proper entries have been passed as to any such goods, and the Customs officer then gives authority for removal of the goods by initialling the delivery order, which authority is presented by the consignee to the ship's delivery clerk, who gives delivery to the consignee *per* his licensed carter. If such cargo is entered for bond—as in this case—the consignee, his carter usually, prior to being allowed to remove any goods from the wharf, produces to the Customs officer a note from the ship's delivery clerk stating the number and particulars of the packages in the particular load he proposes to remove, and the Customs officer checks the correctness of such note and the packages in such load, and if satisfied gives the licensed carter a "cart note" to the Customs locker at the bond stating such

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1914. ship's delivery clerk in his receipt-book and the duplicate is  
MILLS handed to the carter. The cart note is handed to the locker on  
v. delivering the goods to the bond.  
PARKES.

12. The consignee of the said tobacco was Kronheimer Ltd., of Sydney, who on 22nd and 24th October 1912 duly entered the same for warehousing in accordance with the provisions of the *Customs Act 1901-1910* and the Regulations thereunder.

13. Part of the cargo of the said vessel consisted of 232 cases of manufactured tobacco. On Thursday, 24th October 1912, the vessel started to discharge such cases. By Friday, 25th October, 144 cases had been discharged and were then, at a time arranged, weighed, bond-marked and numbered by men from the bond for which they were entered, under the direction and in the presence of the Customs officer on the wharf who noted or caused to be noted and entered in his official book the weights and marks. These cases were then delivered. On the morning of Saturday, 26th October, the remaining 88 cases were landed and placed in the said shed, and on Tuesday, 29th October, such 88 cases were weighed, marked and numbered as aforesaid. On Tuesday, 29th October, 38 of these cases were delivered, leaving a balance of 50 cases. On Wednesday, 30th October, it was found that two out of the said balance had been unlawfully removed from the said shed, and they are now lost.

14. The said two cases of goods have never been entered for home consumption and were never in fact warehoused, and have never been produced to the Customs officers or disposed of or accounted for to the satisfaction of the officers of Customs or the plaintiff save as in the last two paragraphs mentioned, nor has the duty payable thereon or any part thereof been paid.

15. On 25th October 1912 the defendant Parkes applied for clearance of the said vessel and such application was duly granted on the said last mentioned date, and on 26th October 1912 the said vessel left Sydney for New Zealand.

16. The plaintiff contends that the defendant George Arthur Parkes was at the time of the unlawful removal of the said goods the owner of the said vessel and the owner of the said goods within the meaning of the Customs Acts, and that he is



liable to pay the sum of £68 12s. to the Department of Customs in the circumstances above stated either as duties of Customs or as damages. The plaintiff also contends that he is entitled to judgment against the above-named defendants in the sum of £500 under the Customs security herein referred to.

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17. The defendant George Arthur Parkes contends that he is not liable to pay the said sum of £68 12s. or any of it, and the said defendant and the Queensland Insurance Co. Ltd. each contend that they or either of them are not liable for any sum under the said Customs security.

18. The questions for the opinion of this Court are :—

(1) In the stated circumstances are the defendants George Arthur Parkes and the Queensland Insurance Co. Ltd., or either, and if so which of them, liable to the Department of Customs under the said Customs security for the payment of the stated liability of £500 or any part thereof ?

(2) In the stated circumstances is the defendant George Arthur Parkes liable to the Department of Customs in the said sum of £68 12s. ?

19. If the Court be of the opinion that the question 18 (1) above should be answered in the affirmative then a verdict and judgment is to be entered for the plaintiff against the defendants in the action 1913, No. 7, for the sum of £68 12s. with costs including the costs of the action and of and incidental to this special case, but if in the negative then judgment is to be entered for the said defendants with costs including the costs of the action and of and incidental to this special case.

20. If the Court be of the opinion that the question 18 (2) above should be answered in the affirmative then a verdict and judgment is to be entered for the plaintiff in the action 1913, No. 8, for the sum of £68 12s. with costs including the costs of the action and of and incidental to this special case, but if in the negative then judgment is to be entered for the defendant George Arthur Parkes in the action 1913, No. 8, with costs including the costs of the action and of and incidental to this special case.

21. Payment of £68 12s. in either action is to be satisfaction of the verdict in both.



H. C OF A.     *Armstrong*, for the plaintiff.

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*Brissenden*, for the defendants.

During argument reference was made to the *Customs Act* 1901, secs. 4, 30, 33, 42, 44, 48, 149, 153.

GRIFFITH C.J. This action is brought upon a Customs security which was given by the defendant Parkes and the other defendant in conformity with sec. 42 of the *Customs Act* 1901 (No. 6 of 1901), which provides that "The Customs shall have the right to require and take securities for compliance with this Act and generally for the protection of the revenue of the Customs." The defendant Parkes was agent for the ship *Birkenfels*, and on the arrival of the ship he and his co-defendant gave security to enable the ship to be unloaded, by which they acknowledged themselves bound to the Customs of the Commonwealth in the sum of £500, subject to certain conditions, two of which were that if goods discharged from any vessel for which Parkes was agent should be safely and securely kept on a sufferance wharf or in a shed thereon, and there be preserved in good state and condition free from all loss and damage save such as might arise from unavoidable accident, and that if the duties due or to accrue due on the goods should be paid or the goods be exported, the defendants should be free. The goods in question were landed on the wharf. They disappeared. They were not safely and securely kept. All that can be conjectured is that they were stolen. There is nothing to show that the loss arose through unavoidable accident, proof of which, on the construction of the document, is on the defendants. Moreover, the duty was not paid. Therefore these two conditions of the bond were not complied with. There is therefore no answer to the action. It was agreed that the damages to be awarded in the case should be the amount of the duty, £68 12s., and that the costs should follow the event. There must therefore be judgment for the plaintiff for £68 12s., with the costs of the action 1913, No. 7, and the costs incidental to the special case. The second question raises an interesting point whether apart from the security Parkes



would have been liable as the owner of the goods. It was not argued, and it was unnecessary to argue it, and there should be no costs on either side in the second action.

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ISAACS J. I agree.

GAVAN DUFFY J. I agree.

*First question answered in affirmative.**Second question not answered.*

Solicitor, for the plaintiff, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitors, for the defendants, *Priddle & Gosling*.

B. L.

Foll  
R v Owens &  
Farrington;  
Ex parte  
Seaton (1933)  
49 CLR 20

## [HIGH COURT OF AUSTRALIA.]

DELPH SINGH . . . . . PLAINTIFF;

AND

KARBOWSKY . . . . . DEFENDANT.

*Practice—High Court—Appeal from Supreme Court of a State—Security for costs—Extension of time for giving—Jurisdiction—Special leave—Security not given through default of solicitor—Rules of the High Court 1911, Part I., Order LIII., r. 6; Part II., Sec. III., r. 12; Sec. V., r. 1—Judiciary Act 1903-1910 (No. 6 of 1903—No. 34 of 1910), sec. 35—High Court Procedure Act 1903 (No. 7 of 1903), secs. 35, 37.*

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May 11, 13.

Compliance with the provisions of the rules in Section III. of Part II. of the *Rules of the High Court 1911* as to giving security on instituting an appeal from the Supreme Court of a State is a condition precedent to the coming into existence of a cause in the appellate jurisdiction of the High Court.

Griffith O.J.,  
Barton, Isaacs,  
Gavan Duffy and  
Rich JJ.

The words "procedure of the Court in its Appellate Jurisdiction" in rule 1 of Section V. of Part II., relate only to interlocutory proceedings in an appeal