plaintiff left to pursue her remedy, if she have one, in a new action where the question whether the defendant is liable though not guilty of negligence may be determined.

Appeal allowed. Order appealed from discharged. Case remitted to the Supreme Court for a new trial before a Judge of the Supreme Court. Costs of first trial and of application to the Judge of the County Court for a new trial and of appeal to the Supreme Court to abide the event of the new trial.

Solicitors for the appellant, *Hodgson & Finlayson.*
Solicitor for the respondents, *G. P. Newman.*

B. L.

[HIGH COURT OF AUSTRALIA.]

G. G. CRESPIN & SON . . . . . APPELLANTS;
PLAINTIFFS,

AND

THE COLAC CO-OPERATIVE FARMERS LIMITED . . . . . } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Customs Duties—Contract for sale of goods—Alteration of contract where duty altered—Purchaser to pay amount of increase of duty—Statute—Construction—Ultra vires—Power of taxation—Incidental power—Constitutional law—Interpretation of contract—Customs Act 1901-1910 (*No.* 6 *of* 1901—*No.* 36 *of* 1910), *sec.* 152—*The Constitution* (63 & 64 *Vict. c.* 12), *secs.* 51 (I.), (II.), (XXXIX.), 55.

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By a contract made in Melbourne, and dated 29th May 1914, the plaintiffs agreed to sell to the defendants 80 bales of gunny bags described as "No. 1 Delta potato gunnies, shipped at Calcutta," at a certain price delivered. The terms of payment were "net cash against rail receipts," and delivery was to be made, 40 bales in December 1914 and 40 bales in January 1915. At the date of the contract, gunny bags were free from Customs duty, but, on 3rd December 1914, a duty of 10 per cent. *ad valorem* was imposed upon them. The plaintiffs delivered to the defendants 65 bales which had been entered for home consumption before 3rd December 1914, and 15 bales which had not been so entered until after that date and on which they had paid a certain sum for duty. In an action by the plaintiffs to recover from the defendants the amount so paid,

Held, that the contract was within sec. 152 of the *Customs Act* 1901-1910; that that section was a valid exercise of the power conferred by sec. 51 (II.) and (XXXIX.) of the Constitution; and, therefore, that the plaintiffs were entitled to succeed.

Decision of the Supreme Court of Victoria: *Crespin & Son* v. *Colac Co-operative Farmers Ltd.*, (1915) V.L.R., 580; 37 A.L.T., 102, reversed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the County Court at Melbourne by G. G. Crespin & Son against the Colac Co-operative Farmers Ltd. to recover the sum of £13 2s. 9d., which was alleged to be the amount of Customs duty paid by the plaintiffs on 28th January 1915 on 15 bales of gunny bags purchased by the defendants from the plaintiffs, such duty having been imposed between the date of sale and the delivery to the defendants of the gunny bags.

The material defences were that sec. 152 of the *Customs Act* 1901-1910 did not apply to the contract, and that that section was *ultra vires* the Commonwealth Parliament.

By the contract sued upon, which was made in Melbourne and was dated 29th May 1914, the plaintiffs sold to the defendants "eighty bales No. 1 Delta potato gunnies, each 300 to a bale, 38″ x 28″, 3 x 7, shipped at Calcutta, average weight 2½ lbs., at six shillings and tenpence per dozen delivered." The terms were stated to be "net cash against rail receipts," and delivery was to be "40 bales each month, December 1914, January 1915."

At the hearing it was admitted that on 3rd December a duty of 10 per cent. *ad valorem* was imposed on goods of the description mentioned in the contract, which theretofore had been duty

free; that the goods mentioned in the contract, were of Indian manufacture; that on 27th January 1915 the plaintiffs paid £13 2s. 9d. for duty on 15 bales of gunny bags which were then entered for home consumption and were delivered to the defendants in pursuance of the contract; that those 15 bales had been landed in Australia after the making of the contract; and that the balance of the bales had been entered for home consumption before the duty was imposed.

The County Court Judge gave judgment for the defendants, holding that sec. 152 did not apply to the contract, and an appeal by the plaintiffs to the Supreme Court was dismissed: *Crespin & Son* v. *Colac Co-operative Farmers Ltd.* (1).

From the decision of the Supreme Court the plaintiffs now, by special leave, appealed to the High Court.

The Commonwealth obtained leave to intervene.

Starke (with him *Cussen*), for the appellants. Sec. 152 of the *Customs Act* 1901-1910 means that if on goods actually tendered in pursuance of the contract the duty described has been paid, the vendor is entitled to recover it from the purchaser. This particular contract is for delivery "duty paid," for the delivery agreed to be made cannot be made until the duty has been paid. "Duty paid" means the same thing as "free of duty." Sec. 152 is within the legislative powers of the Commonwealth Parliament. It may be justified under the power conferred by sec. 51 (II.) of the Constitution to make laws with respect to taxation, or under the power conferred by sec. 51 (XXXIX.) to make laws with respect to matters incidental to the execution of the powers vested in Parliament, or under the trade and commerce power conferred by sec. 51 (I.). The object of the Legislature in sec. 152 is that, where an alteration of the duty upon goods of a particular kind has been made after a contract for the sale of goods of that kind and before delivery, the person who actually gets the goods should bear the burden or take the benefit of the alteration. Such an adjustment of the incidence of taxation is directly within the power conferred by sec. 51 (II.). A provision similar to that contained in sec. 152 was inserted in many Statutes,

(1) (1915) V.L.R., 580; A.L.T., 102.

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both English and Australian, dealing with Customs duties before federation. See *Customs Tariff Act* 1855 (18 & 19 Vict. c. 97), sec. 9; *Customs Consolidation Act* 1876 (39 & 40 Vict. c. 36), sec. 20; *Customs Duties Act* 1874 (Qd.) (37 Vict. No. 8), sec. 6; *Customs Duties Act* 1895 (N.S.W.), sec. 6; *Customs Amendment Act* 1894 (S.A.), sec. 3. That shows that such a provision was then generally regarded as being appropriate and necessary, and therefore incidental, to taxation by means of Customs duties. Sec. 152 is a law with respect to taxation, for it is a provision which is fairly relevant or incidental to the imposition of taxation. See *Osborne* v. *The Commonwealth* (1). It is not, however, a law imposing taxation, and so is not affected by the first paragraph of sec. 55 of the Constitution, the rest of the Act not imposing taxation. Nor is sec. 152 affected by the second paragraph of sec. 55, because it and the rest of the Act only deal with one subject of taxation, namely, Customs duties. If sec. 152 is not within sec. 51 (II.) of the Constitution it is doubtful if it is within sec. 51 (XXXIX.), for pl. XXXIX. only expressed what would be implied from pl. II. if it stood by itself. See *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.* (2); *R.* v. *Kidman* (3). Sec. 152 may be supported under the trade and commerce power, sec. 51 (I). Contracts for the importation of goods are necessarily subject to that power, which covers not only the act of transportation, but also any instrumentalities concerned in the act of transportation. Examples of similar legislation under the trade and commerce power are the *Harter Act* in America and the *Sea-Carriage of Goods Act* 1904 here. On the face of this contract, the goods were to be imported, and they were to be shipped at Calcutta for the purpose of the contract. [Counsel also referred to *Australasian United Steam Navigation Co.* v. *Hiskens* (4); *New South Wales* v. *The Commonwealth* (5).]

Mann, for the Commonwealth, intervening. Sec. 152 is within the powers conferred by sec. 51 (XXXIX.). The Customs duties are a tax upon the importation of goods in respect of the person

(1) 12 C.L.R., 321, at p. 373.
(2) (1914) A.C., 237; 17 C.L.R., 644.
(3) 20 C.L.R., 425, at p. 433.
(4) 18 C.L.R., 646.
(5) 20 C.L.R., 54, at p. 95.

who imports them, and it is among the incidental powers to say upon whom the burden of the tax shall fall. Alternatively, if the Court should be of opinion that, in its widest construction, sec. 152 is not within the powers conferred by the Constitution, it should be given a narrower construction; that is to say, it should be read as applying to goods as to which the purchaser has a proprietary interest at the time they are entered for home consumption. So construed, the section would be incidental to the power of levying Customs duties. [Counsel referred to *Attorney-General of New South Wales* v. *Collector of Customs for New South Wales* (1); *Waterhouse* v. *Deputy Federal Commissioner of Land Tax* (2).]

Sir William Irvine K.C. (with him *Latham*), for the respondents. Sec. 152 of the *Customs Act* only applies to contracts for the sale of specific goods, that is, where the subject matter of the contract is identified by the contract itself. The class of contracts which the Legislature contemplated was the ordinary importing contract in which the goods are appropriated to the contract as soon as they are put on board ship. The critical time to look at is the time of the entry of the particular goods for home consumption. If at that time those particular goods are the subject matter of a contract of sale, that is to say, if those particular goods have been appropriated to a particular contract of sale, then at that point of time the contract is altered in the manner stated. The goods may be so appropriated either because they were specified goods or because one party has, with the assent of the other, appropriated them to the contract. The word "they" in the third line of sec. 152 refers to certain specific goods which have been entered for home consumption, and it also refers to "such goods," which are the goods the subject matter of the contract. This contract is not one for the sale of specific goods. The words "shipped at Calcutta" are words of description only, and refer to a certain class of gunny bags. See *Bowes* v. *Shand* (3). The purchaser would not have a right to reject gunny bags which had been shipped before the contract was

(1) 5 C.L.R., 818.
(2) 17 C.L.R., 665, at p. 669.
(3) 2 App. Cas., 455, at p. 467.

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made. The legislative power as to taxation is not added to by the use of the words "with respect to," which are only words of grammatical connection. The whole power is included in the general heading "Taxation" together with anything that may be added by sec. 51 (XXXIX.)—if, indeed, anything is added by it. The power of taxation includes not only the power to levy a tax but power to make the tax effective. The latter power is the only one which can properly be described as an incidental power. What the Legislature purported to do by sec. 152 is, having by another Act taxed particular classes of goods, to make provision that, the tax having been paid, the person who has paid it may recoup himself by making another person pay an equivalent amount to him. That is not incidental to the power of taxation. The power to prevent hardship arising from the exercise of a power is not incidental to the latter power. The fact that other Legislatures with plenary powers have enacted provisions similar to sec. 152 carries the matter no further. Sec. 152 cannot be supported under the trade and commerce power. Parliament may legislate with regard to contracts as to foreign and inter-State trade and commerce, but only so far as the contracts relate to foreign or inter-State trade and commerce. If the section relates to goods in bond, it cannot come within the trade and commerce power. Transportation is an essential element of that power: *Prentice and Egan's Commerce Clauses*, p. 144; *Philadelphia Steamship Co.* v. *Pennsylvania* (1).

Starke, in reply.

Cur. adv. vult.

March 24.

The following judgments were read:—

GRIFFITH C.J. The plaintiffs (appellants), by a contract dated 29th May 1914, agreed to sell to the defendants (respondents) 80 bales of Delta potato gunny bags shipped at Calcutta at 6s. 10d. per dozen delivered. The terms of payment were "net cash against rail receipts," and delivery was to be made of 40 bales in the December and 40 in the January following. Delivery was to be in Melbourne. At the date of the contract, gunny

(1) 122 U.S., 326, at p. 339.

bags were free from Customs duty, but on 3rd December 1914 a duty of 10 per cent. *ad valorem* was imposed upon them. Plaintiffs in fact delivered in part performance of the agreement 65 bales which had been entered for home consumption before that date, but in respect of the other 15 bales, which had not then been so entered, they had to pay duty. The action was brought to recover the amount so paid. The claim is made by virtue of the provisions of sec. 152 of the *Customs Acts* 1901-1910, which provides that:

"If after any agreement is made for the sale or delivery of goods duty paid any alteration takes place in the duty collected affecting such goods before they are entered for home consumption then in the absence of express written provision to the contrary the agreement shall be altered as follows:—

(*a*) In the event of the alteration being a new or increased duty the seller after payment of the new or increased duty may add the difference caused by the alteration to the agreed price.

(*b*) In the event of the alteration being the abolition or reduction of duty the purchaser may deduct the difference caused by the alteration from the agreed price."

In the present case the contract was for the sale of goods of external origin, and it is not disputed that it was for the sale of goods duty paid, but the respondents contend that sec. 152 only applies to contracts for the sale of specific goods. I confess my inability to appreciate the arguments on which this contention is founded. The terms of the section are plain and unambiguous. It applies, of course, only to goods in respect of which duty is payable, that is to say, goods of external origin. But its terms are general: "any agreement for the sale or delivery of goods duty paid." The section becomes operative upon the happening of the event specified, *i.e.*, an alteration in the duty collected affecting such goods before they are entered for home consumption, which, of course, means an alteration in the tariff affecting goods of that class. When this event happens the agreement is to be altered in the manner specified, that is to say, it is to be read from that date, if not *ab initio*, as containing a stipulation that the seller may add the increased duty to the price. In this

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there is no ambiguity. The new agreement only comes into operation "after payment of the new or increased duty," that is, in cases in which the seller has for the purpose of performing the contract entered goods for home consumption. If, by the express or implied terms of the contract, the seller was not at liberty to perform it by the delivery of goods which had not then already been entered for home consumption, the section would have no application. It is not suggested that the agreement in the present case contained any such stipulation.

The defendants also contend that sec. 152 is *ultra vires* of the Commonwealth Parliament. The answer to the argument may be put very briefly. Amongst the powers of legislation conferred upon the Parliament by sec. 51 is a power to make laws with respect to taxation (sec. 51, pl. II.). Now, laws with respect to taxation necessarily include many provisions besides the imposition of taxes, and all such provisions as are reasonably incidental to the exercise of the power of taxation are, irrespective of the express provisions of sec. 51, pl. XXXIX., authorized by the express grant. It is obvious that one effect of the imposition of new taxation through the Customs (which, in practice, takes effect immediately on its being proposed in Parliament) may be to work a great hardship, and even injustice, in the case of agreements which have been already made for the sale or delivery of goods of external origin if the seller is saddled with the burden of the added taxation. It would be a very lame and impotent Legislature that, being entrusted with the power of imposing Customs taxation, could not make provision to avoid such injustice. I have, therefore, no difficulty in holding that sec. 152 is within the power to make laws with respect to taxation.

If there were room for any doubt on the matter, it is removed by the historical fact that similar provisions have for a long period been regarded by British Legislatures as fit to be added to laws imposing Customs and excise duties. The earliest Act of the United Kingdom to which we were referred was the *Customs Tariff Act* 1855 (18 & 19 Vict. c. 97). That Act contains (sec. 9) an enactment similar to sec. 152 now under consideration, which has been re-enacted in the United Kingdom from time to time ever since. Before the establishment of the Commonwealth

similar provisions had been enacted in Queensland (1874), and in South Australia and New South Wales, in each case in an Act dealing with Customs taxation. It is therefore clear that when the Constitution of the Commonwealth was framed such provisions were regarded as laws relating to taxation, and a power to make laws "with respect to taxation" would, as a mere matter of interpretation, have been understood to include such a matter.

For these reasons I am of opinion that the appellants were entitled to judgment in the action, and that the appeal should be allowed.

BARTON J. Of the 80 bales of Delta potato gunnies mentioned in the agreement of 29th May 1914, 65 bales were delivered without claim of duty, as they had been entered for home consumption before the imposition of the duty. As to the remaining 15 bales, in respect of which the plaintiffs claim against the defendants an increase upon the contract price of £13 2s. 9d., that amount represents 10 per cent. duty *ad valorem*.

This class of goods having been free theretofore, the duty in question was imposed on 3rd December 1914. The duty on the 15 bales was paid upon entry for home consumption on 27th January 1915.

Thus it appears that the alteration in duty, though, of course, made after the agreement, took place before the goods were entered for home consumption.

I am of opinion that the terms of the contract applied to the facts bring the case within sec. 152 of the *Customs Act*. "Shipped" means "to be shipped," in view of the dates. That section is absolutely clear in its terms. It is contended that it applies only to specific goods, or to goods appropriated to the seller with his consent before entry for home consumption. I regard this interpretation as conjectural. It certainly is not warranted by the terms of the section, and it is supported only by argument as to consequences which may in certain cases constitute hardship to buyers. It may be, though I certainly do not say so, that the Legislature ought to have confined the section in its application to cases such as the respondents

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describe, but that is not a question which affects the construction of the section.

As to the contention that the provision is beyond the power of Parliament, it does not appear to be well founded. It is urged that it relates to a subject exclusively within the competence of the State Legislatures. It would be a strange and incongruous thing that a Parliament having power to impose a Customs duty should be so restricted in the exercise of that power as to be unable to alleviate a manifest hardship in the incidents of the duty, and that any such hardship must continue until the Legislature in which the port of entry is located should choose, if it ever chose, to relieve against the hardship. But that is clearly not the position.

By the Constitution, sec. 51 (II.) the Federal Parliament has power to make laws "with respect to" taxation. Authority to make laws "with respect to" any subject extends to matters incidental to such laws. That is, of necessity, included in the power granted. There is also by sec. 51 (XXXIX.) a power to make laws with respect to "matters incidental to the execution of any power vested . . . in the Parliament." Though the incidental power would have been exercisable without this express grant, the sub-section makes assurance doubly sure. Sec. 55 of the Constitution does not apply in either branch of it. The *Customs Act* is not a "law imposing taxation," though it is read with the *Tariff Act* for purposes of construction. It is, of course, a law "with respect to" taxation, but that does not of itself bring it within the section.

Now, it seems to me that a provision such as sec. 152 finds its proper place in a Federal Customs Act. The making of provision for the alleviation or removal of that which would otherwise, in the execution of a contract for sale, made before the imposition of a new or increased duty, but to be performed at a date which happens after the intervention of the duty, is an adjustment of a kind necessary for securing the equitable operation of the law. It is true that it affects certain contracts, and that legislation upon contracts is ordinarily the province of the State and not of the Federation. But this is a case of the adjustment of obligations which necessarily are affected fairly or unfairly, but

directly, by the federal law, and it is impossible to say that in such a case as this the endeavour to prevent the unfair effect is not within the competence of the makers of that law.

The provision questioned has long been usual in Customs Acts. It finds a place for many years in English Customs Acts, such as those of 18 & 19 Vict. and 39 & 40 Vict. It appears too as the 10th section of the *Finance Act* 1901 (1 Edw. VII. c. 7); and the Queensland *Customs Duties Act* of 1874, the South Australian *Customs Amendment Act* of 1894, and the New South Wales *Customs Duties Act* of 1895, all have similar provisions. So that before the Federal Constitution was passed it may fairly be said that such a provision had been long recognized as incidental to Customs legislation.

I do not however, base my opinion on these enactments. It rests on the reason of the thing.

I am of opinion that the learned Chief Justice of Victoria was right, and that the appeal should be allowed, and the plaintiffs should have judgment.

Isaacs J. Sec. 152 is part of an enactment which was passed on 3rd October 1901 and, under sec. 2 of the Act, was proclaimed to commence the next day. The section has reference to Commonwealth duties only, and as on 8th October 1901 Commonwealth Customs duties were first imposed (see sec. 4 of Act No. 14 of 1902) it applies and is confined to agreements thereafter made. Sec. 152 is general, and is a statutory provision which runs with, and is to be read into, every agreement for the sale and delivery of goods "duty paid." The expression "duty paid" implies, in my opinion, that the goods, the subject matter of the contract, are goods of foreign origin which, by the contemplation of the parties to be deduced from the contract, have not yet been entered at the Customs for home consumption, and that by the terms or effect of the contract the vendor is to pay and bear the duty, if any, in respect of them.

This section, consequently, includes both goods to be imported and goods already imported but still in bond.

But, in my opinion, unless by the terms of the contract it appears either expressly or by implication that the parties had

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in contemplation foreign goods not yet entered for home consumption, the section has no application. In other words, it is not sufficient, as I read the section, to say merely that the goods satisfied the contract, that they were entered for home consumption after its date, and that the duty was altered. The nature of the agreement itself is a *sine quâ non* of the application of the section. Otherwise many contracts made on a purely local basis would be unexpectedly affected.

The contract in this case was made in May 1914, and relates to Indian gunny bags described (*inter alia*) as "shipped at Calcutta," and deliverable in two instalments, half in December 1914 and half in January 1915. Having regard to the well known nature of the goods and the dates of contract and future delivery, the expression "shipped at Calcutta" indicates, at all events *primâ facie*, the contemplation of the parties that the goods are not yet in Australia. There is nothing to displace that *primâ facie* conclusion. The price is 6s. 10d. per dozen "delivered." The contract is therefore within the ambit of the section.

I do not agree with the argument that the section is limited to specific, or rather, identified goods, goods which by appropriation pass to the purchaser before entry for home consumption. "Goods" is defined by sec. 4 as including "all kinds of movable personal property." The term "such goods" in the section means, in my opinion, any goods that are agreed to be sold or delivered "duty paid," as I have explained that term.

The goods claimed for were, after the date of the contract, imported; before they were entered for home consumption, there took place an alteration of duty "affecting" the goods, because it included all goods of that kind, the altered duty was paid by the vendor, and so the section took effect. That is, since there is no express written provision to the contrary, the agreement is "altered." The expression "the agreement shall be altered" means simply that the stipulations of the agreement are to be modified according to the event, as settled by the self-executing provisions set out in the section, which are taken as introduced into or appended to the agreement itself by force of law, standing

there as from the beginning, and providing for the event if and when it should happen.

The appellants are therefore clearly entitled to succeed if the enactment is valid. The particular amount claimed is itself unimportant; the construction of the Act is highly important to the mercantile community, but that is capable of alteration if the power to legislate exists. It is the question of the legislative power of the Commonwealth to enact such a law at all, and, if at all, in the form in which it has been enacted, that is the most crucial problem we have to consider.

On these points *Madden* C.J. held in favour of validity; *Hood* J. thought the enactment invalid on both grounds; *Cussen* J. thought it invalid on the first unless it applied only to specific goods, and gave no opinion on the second. In my opinion *Madden* C.J. was right.

Dealing first with the question of form. Sec. 55 of the Constitution, by its first branch, declares:—"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." This is said to be contravened by the presence of sec. 152. But unless the *Customs Act* 1901 is a "law imposing taxation" that provision has no application. The Act imposing the taxation is not that Act (which is a Customs Regulation Act) but the *Customs Tariff Act*. The object and effect of the first branch of sec. 55 can be seen by reference to sec. 53. To hold that the Customs Regulation Act was a law imposing taxation would deny the power of the Senate to originate or amend it. It would do more: it would, for instance, eliminate the punitive provisions which clearly do not deal with the "imposition" but with the enforcement of other incidental provisions framed to secure the collection of the tax imposed.

The only real question is whether such an enactment as sec. 152 is incidental to the execution of the power of taxation. The Privy Council asks (*Colonial Sugar Co.'s Case* (1)) is such a provision one of the "incidents" in the exercise of the power. Whether a given power is incidental to a main power cannot be predicated in all cases without reference to both the inherent

(1) (1914) A.C., 237, at p. 256; 17 C.L.R., 644, at p. 655.

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nature of the main power and to the circumstances upon which it operates. I refer to some observations of my own in *Jumbunna Coal Mine, No Liability* v. *Victorian Coal Miners' Association* (1), and need not repeat them. See also the reasons for not holding certain Canadian legislative provisions incidental in the then existing circumstances: *City of Montreal* v. *Montreal Street Railway* (2).

In the present case the main power is "taxation" contained in sec. 51 (II.).

But the concept of "taxation" is not rigid or invariable. It takes various forms according to its object. It is sufficient for present purposes to say that it divides itself into two great classes—(1) direct and (2) indirect; and the recognition of this fact, and of the reason for it, affords the answer to the problem we are dealing with.

The frame of the Canadian Constitution has rendered it necessary to consider with precision the distinction between these two great branches, and the Judicial Committee has settled their respective *indicia* as a matter of common understanding.

They adopted in two cases the definition of John Stuart Mill in these terms:—"A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such are the Excise or Customs." The two cases referred to are *Bank of Toronto* v. *Lambe* (3) and *Cotton* v. *The King* (4).

It is plain that in the case of a direct tax the end of the Legislature is achieved by imposing it on the person intended to pay it, and by incidental provisions securing not only payment by him but also that it is he who shall pay it in reality.

But in the case of indirect taxation, which imports by the above definition the Legislature's expectation and intention that the person immediately paying shall indemnify himself at the expense of another, the legislative intention is not necessarily

(1) 6 C.L.R., 309, at pp. 376, 377.
(2) (1912) A.C., 333, at pp. 344, 345.
(3) 12 App. Cas., 575.
(4) (1914) A.C., 176.

achieved by leaving the matter unprovided for; it may be frustrated without such a provision.

Inherently, therefore, this main power, so far as relates to the branch of indirect taxation, may have as an incident to its effective legislative exercise the subsidiary power of providing for the indemnity connoted by the nature of an indirect tax.

A priori, therefore, upon the common understanding of what is meant by imposing a Customs and Excise duty, the power of enabling a vendor to add such an increased duty would exist.

Nor is there any fundamental distinction in theory to be drawn between the case of adding an increase of duty and deducting a decrease. What the Legislature has done, it may undo; and if its intention is effected by adding a duty to what would be the price without the duty on the supposition that the lower duty would continue, it can equally correct the error, as it turns out to be, by providing for the case on its true basis of lower duty when the supposition of a higher duty is falsified.

This *à priori* reasoning is supported by legislative practice, which, for a very long period, has adopted it. During the argument various Australian Acts of Parliament were referred to by Mr. *Mann* as containing relevant provisions in Customs Tariff Acts or Customs Regulation Acts—as the Queensland Act of 1874 (37 Vict. No. 8, sec. 6), which provided for adding increased duties; the South Australian Act of 1894 (No. 595), which provided for adding increased duties; and the New South Wales Act of 1895 (No. 18, sec. 6), providing for decreases of duty.

Also the English *Customs Consolidation Act* of 1876 (39 & 40 Vict. c. 36), sec. 20, was mentioned. These were all before our *Constitution Act*. Since that Act was passed, other English provisions have been enacted, *Finance Act* 1901 (1 Edw. VII. c. 7), sec. 10, applying as does the Commonwealth Act to new duties as well as to increased duties—the English Act of 1876 not referring to new duties. The *Finance Act* is only confirmation of the view that such a provision was considered as incidental to "Customs and Excise" at the time the *Constitution Act* was passed, because it was enacted so shortly afterwards, and the tenth section is under Part I. headed "Customs and Excise."

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Since the argument Mr. *Starke* referred us to the Imperial *Customs Tariff Acts Amendment and Consolidation Act* of 1855, sec. 9 of which provided for increases and decreases of duty.

I would add other instances I have found. Taking Australia first, I find that the Tasmanian *Customs Duties Act* of 1894 (58 Vict. No. 4) contained sec. 28 which copied sec. 20 of the English Act of 1876. So that in four States of the Commonwealth legislation of the character now challenged was before 1900 considered by the Parliaments as incidental to the subject of Customs taxation.

So far we have precedent dating from 1855. I have found some earlier instances at random, and I have no doubt there were others before the first I quote, and between that and the rest.

The earliest I refer to is an Imperial Customs Act imposing duties on foreign wines and dated 1796 (36 Geo. III. c. 123). By sec. 9 it is enacted:—"And whereas contracts may have been made for the sale of wine before the same shall have been charged with the duties by this Act imposed; be it therefore enacted, That in all cases where any wine, wherein the respective duties by this Act imposed shall be charged, shall have been after the said 17th April 1796 or shall be delivered in pursuance of such contracts or sales, it shall be lawful for the dealer or dealers in such foreign wine, delivering the same to charge so much money as shall be equivalent to the duties of this Act imposed in respect thereof, in addition to the price of such wine and by virtue of this Act to demand and be paid the same accordingly." That is the type.

The next I refer to is a *Customs and Excise Act* of 1803 (43 Geo. III. c. 92), by sec. 34 of which additional duties on malt were allowed to be added. A third Act of the kind is one of 1805, a Customs Act (45 Geo. III. c. 29, sec. 18). Another Act is in 1810 (50 Geo. III. c. 77), an Act for imposing additional duties of Customs on wood; sec. 9 of that Act provides for the addition of the duties to contract price, and is, similarly to the preceding enactment, interesting with respect to the argument of limiting sec. 152 to specific goods. An Act of 1816 (56 Geo. III. c. 44), is an Excise Duties Act, and sec. 3 of that Act is on the

same lines as sec. 9 of the Act of 1810. There is also the *Excise Act* of 1854, of which sec. 7 is the relevant section, and I would draw attention to its preamble; then follows the Act of 1855 referred to by Mr. *Starke*.

There has appeared for over 100 years, at least, prior to our Constitution so consistent and so strong a general practical recognition of the theory which I have referred to, that such legislation is to be regarded as incidental to Customs and Excise and properly classed with the Statutes dealing with those subjects, that in my opinion it is not seriously open to doubt that it passes as, and is, an incidental power resident in the Commonwealth Parliament in connection with Customs and Excise taxation.

The view thus presented is emphasized by sec. 90 of the Constitution, which makes the Commonwealth taxing power in respect of Customs and Excise exclusive. That at least indicates that nothing which has been hitherto regarded as incidental to taxation of that nature is denied to the Commonwealth.

I hold the section is valid, and, for all the reasons I have stated, I agree that the appeal should be allowed.

HIGGINS J. The first question is as to the meaning of sec. 152 of the *Customs Act* 1901-1910. I can see no reason for limiting the application of the section to agreements for specific goods. The words are "any agreement for the sale or delivery of goods duty paid"; and these words in their ordinary meaning would apply to the case of executory agreements for the sale or delivery of goods of a certain character, cases where (as here—it is so admitted) the vendor has the right to say which of his goods of the character described, he will appropriate to the fulfilment of his contract (see *Benjamin on Sales*, 3rd ed., 295, 303). Then, though the section prescribes that the goods must be "duty paid," it is not necessary that the contract should expressly provide for payment of duty by the vendor; it is enough that this condition should be implied by contract; and here it is to be implied from the words "net cash against rail receipts." It is obvious that the goods could not be brought to the railway for transmission until the vendor has cleared the Customs—has entered them for home consumption.

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It is quite true that cases of hardship or anomaly may be suggested as a consequence of this contruction—as, indeed, they may be suggested as a consequence of the opposite construction. As counsel for the respondents said, a contract may be made on 1st July for delivery on 1st October; on 1st August a duty may be imposed; and the purchaser may not know between August and October whether he is to get goods on which duty has been paid, or goods which have been cleared before 1st August on which no duty has been paid. This position may be very awkward for merchants who buy to sell again. But the obvious answer is, *caveat emptor*; the purchaser might have made "express written provision" which would prevent the alteration of the contract by the addition of the duty.

If it is necessary to express one's views on the much debated point, as to the moment when the contract becomes altered by the section, I should say that at present it seems to me to be the moment when the goods, duty paid or not, are appropriated to the purchaser. I do not agree with the argument that the alteration must take place before the entry for home consumption, before duty has been paid.

The second question is, is such a section as sec. 152 within the legislative powers—any of the powers—of the Commonwealth. Sec. 152 does not tax. As *Hood* J. said, "such legislation is not taxation . . . The government revenue is no longer concerned." But the matter does not end there. The power of the Commonwealth Parliament is not merely to tax, or "to levy and collect taxes" &c. (as in the Constitution of the United States) but "to make laws for the peace, order, and good government of the Commonwealth *with respect to* . . . taxation." I have called attention to the force and significance of these words in *Attorney-General for New South Wales* v. *Brewery Employees Union of New South Wales* (1) and in *R.* v. *Kidman* (2). If in imposing a tax Parliament think that the tax will cause injustice as between parties to a contract unless the burden be transferred or shared, a law for transferring or sharing the burden of the tax would, in my opinion, be a law *with respect to* taxation. Or if, in the case of a land tax, Parliament taxed the

(1) 6 C.L.R., 469, at p. 610.

(2) 20 C.L.R., 425.

landowner, but feared that he would transfer the burden to his tenant, Parliament could, I think, provide that any agreement for so transferring the burden should be void. It is the duty of Parliament not only to get money by taxation for necessary purposes, but to get it with a minimum of injustice and inconvenience to the taxpayer; it has to aim at "peace, order, and good government" in the exercise of all its legislative powers; and it is for Parliament to determine what conduces to that end, in legislating on the subject committed to it.

I do not think that it is necessary for the Crown to rely on sec. 51 (XXXIX.). If not fettered by authority, I should think that pl. XXXIX. would cover this case; but since the decision of the Judical Committee in the *Colonial Sugar Co.'s Case* (1) I do not feel confident as to the effect of that placitum.

Of course, the fact that a provision similar to sec. 152 is found in Customs Acts of Great Britain and of several of the colonies before federation does not conclusively show that it comes within the power "to make laws with respect to taxation" conferred by the Constitution; but it shows, at the least, that sec. 152 is not a subject alien to the subject of Customs, that it is not a novel and violent annexure to that subject, that it is not an unheard of and impertinent intruder. It shows that these Legislatures thought that they should not legislate for Customs without legislating to prevent the injustice which the Customs duties might involve as between parties to bargains. I have, for the purposes of this case, assumed (without deciding) that the respondents are right in reading the words in the contract "shipped at Calcutta" as words of description—not as if they were "to be shipped at Calcutta." I am also treating the words "duty collected" in sec. 152 as meaning "duty colligible and being collected." I prefer to leave the question open as to the provisions of sec. 152 being warranted by the trade and commerce power (sec. 51 (I.)). It is not well to form or to express views on a constitutional question until a case arises in which an answer to the question becomes absolutely necessary.

We have not been asked to consider the effect of sec. 55 of the Constitution; as counsel for the respondents does not urge that

(1) (1914) A.C., 237; 17 C.L.R., 644.

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the *Customs Act* 1901-1910 is a "law imposing taxation." On this subject, I may be allowed to refer to my remarks in *Osborne* v. *The Commonwealth* (1) and *Kidman's Case* (2), with this qualification, that owing to the differences between Customs taxation and direct taxation I should not, without more consideration, treat a Customs Tariff Act as not being, in itself, a "law imposing taxation."

In my opinion, the appeal should be allowed.

RICH J. The contract in this case, having regard to the nature of the goods and the dates and terms of delivery, is, in my opinion, one for the sale of gunnies to be shipped at Calcutta after the date of the contract. Thus construed, the contract is within sec. 152 of the *Customs Act*.

This section falls within the ambit of sec. 51 (II.) of the Constitution. Although incidentally sec. 152 affects contractual obligations, in substance it deals with taxation by determining its incidence. Such a power is included in the express authority to make laws for the peace, order, and good government of the Commonwealth with respect to taxation.

Appeal allowed. Order appealed from discharged. Appeal to Supreme Court allowed with costs. Judgment for plaintiffs for the amount claimed with costs.

Solicitors for the appellants, *Read & Read.*
Solicitors for the respondents, *Harwood & Pincott.*

B. L.

(1) 12 C.L.R., 321.

(2) 20 C.L.R., 425.