

## [HIGH COURT OF AUSTRALIA.]

NOTT BROS. &amp; CO. LTD.

PLAINTIFF;

AGAINST

WILLIAM HENRY BARKLEY (COLLECTOR )  
OF CUSTOMS FOR NEW SOUTH WALES) } DEFENDANT.

H. C. OF A. *Customs Duties—Dumping exchange duty—Validity—Power of Commonwealth Parliament—Law as to taxation—Imposition of tax—Delegation of power to tax—Exclusive power of Commonwealth Parliament—Specification of goods as to which duty is payable—The Constitution (63 & 64 Vict. c. 12), secs. 55, 90—Customs Tariff (Industries Preservation) Act 1921-1922 (No. 28 of 1921—No. 20 of 1922), secs. 8\*, 13.*

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SYDNEY,

April 29;

May 7.

Knox C.J.,  
Isaacs, Higgins,  
Rich and  
Starke J.J.

The *Customs Tariff (Industries Preservation) Act 1921-1922* deals only with the imposition of taxation, and therefore does not infringe the first paragraph of sec. 55 of the Constitution.

Sec. 8 of the *Customs Tariff (Industries Preservation) Act 1921-1922* deals with duties of customs only, and therefore does not infringe the second paragraph of sec. 55 of the Constitution.

The tax imposed by sec. 8 is imposed by the Parliament of the Commonwealth and is not an infringement of the provision in sec. 90 of the Constitution that the power of the Parliament to impose duties of customs shall be exclusive.

*Powell v. Apollo Candle Co.*, (1885) 10 App. Cas. 282, applied.

\* Sec. 8 of the *Customs Tariff (Industries Preservation) Act 1921-1922* provides (so far as is material) that “(1) If the Minister is satisfied, after inquiry and report by the Tariff Board, that the exchange value of the currency of the country of origin or export of any goods has depreciated, and that by reason of such depreciation goods have been or are being sold to an importer in Australia at prices which will be detrimental to an Australian industry, the Minister may publish a notice in the *Gazette* specifying the country as to the exchange value of the

currency of which he is so satisfied, and the goods originated in or exported from that country to which in his opinion the provisions of this section should apply. (2) Upon the publication of the notice, there shall be charged, collected and paid to the use of the King, for the purposes of the Commonwealth, on all goods specified in the notice, produced or manufactured in or exported from the country specified therein, a special duty, at a rate to be ascertained in accordance with the Schedule.”



Under secs. 8 and 13 of the *Customs Tariff (Industries Preservation) Act* 1921-1922 the Minister for Trade and Customs may exercise the power of specifying the goods to which the section shall apply by stating that the section shall apply to all goods of a certain description originated in or exported from a certain country.

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#### SPECIAL CASE.

In an action brought by Nott Bros. & Co. against William Henry Barkley, Collector of Customs for New South Wales, a special case, which was as follows, was stated by the parties for the opinion of the Full Court of the High Court :—

1. This is an action brought by Nott Bros. & Co. Ltd. against the Collector of Customs for the State of New South Wales for the recovery of £393 3s. 9d. paid as special duty under sec. 8 (2) of the *Customs Tariff (Industries Preservation) Act* 1921-1922 on certain artificial flowers originated in and exported from France.

2. The said artificial flowers were sold to the plaintiff Company between 7th April 1924 and 21st May 1924 and were imported into the Commonwealth, and customs entries were passed therefor between 4th July 1924 and 31st July 1924.

3. The invoices produced to the customs showed the value of the said goods in French currency, and duty was paid on the said goods in accordance with the *Customs Act* 1901-1923 and the *Customs Tariff Act* 1921 at a fair rate of exchange, as provided by the said *Customs Act*.

4. The said special duty, amounting to £393 3s. 9d., was paid under protest in accordance with the *Customs Act* 1901-1923, and this action for its recovery was duly brought within the time limited by the said *Customs Act*.

5. An inquiry was made by the Tariff Board prior to 8th February 1924, and on the said 8th February 1924 the said Tariff Board made a report to the Minister.

6. On 14th February 1924 there was published in the Commonwealth of Australia Gazette a notice as follows :—“*Customs Tariff (Industries Preservation) Act* 1921-1922.—Notice under Sec. 8.—In pursuance of sec. 8 of the *Customs Tariff (Industries Preservation) Act* 1921-1922, I, Austin Chapman, Minister of State for Trade and Customs, hereby notify that, after inquiry and report by the Tariff



H. C. OF A. Board, I am satisfied that the exchange value of the currency of  
 1925. France, being the country of origin or export of the undermentioned  
 ~~~~~ goods, has depreciated, and that by reason of such depreciation  
 NOTT BROS. & Co. LTD. those goods have been or are being sold to an importer in Australia  
 v. at prices which will be detrimental to an Australian industry, and  
 BARKLEY. that, in my opinion, the provisions of sec. 8 of the said Act should  
 apply to those goods : Artificial flowers and fruits in sprays, trails,  
 posies, or otherwise originated in or exported from France. This  
 notice may be cited as ' Industries Preservation Act Notice No. 157 '  
 and shall have effect as on and from 8th February 1924 (T. & C.  
 24/B/852).—Dated this 8th day of February 1924.—Austin  
 Chapman, Minister for Trade and Customs."

7. Artificial flowers are imported in sprays, trails, posies and otherwise.

8. A large number of different varieties of artificial flowers are made or have been made in Australia, the actual varieties changing quickly according to fashion.

9. Some of the varieties of artificial flowers imported as aforesaid and upon which some of the aforesaid special duty was paid were not at the time of such importation being manufactured in Australia, but the Australian industry was capable of manufacturing the same.

10. Some of the varieties of artificial flowers imported as aforesaid and upon which some of the aforesaid duty was paid were being sold in Australia to retailers at a wholesale price equal to or greater than the manufacturer's selling price of comparable Australian-made articles of the same varieties.

11. The plaintiff Company contends as follows : (a) That the *Customs Tariff (Industries Preservation) Act* is *ultra vires* the Parliament of the Commonwealth ; (b) that the provisions contained in sec. 8 of the said Act delegating to the Minister the power to bring the said section into operation are *ultra vires* the Parliament of the Commonwealth ; (c) that the provisions of Part A of the Schedule to the said Act are *ultra vires* the Parliament of the Commonwealth ; (d) that the action of the Minister, in notifying on 8th February 1924 that the provisions of sec. 8 of the said Act should apply to the goods mentioned therein, is unlawful ; (e) that the Minister cannot impose the said special duty on a class as a whole as set forth in the



notice dated 8th February 1924 ; (f) that the different varieties to which the special duty is to be applied must be specified ; (g) that the Minister cannot apply by notice the special duty to a whole class if certain varieties of such class are in fact being imported at a higher cost and sold in Australia at a higher price than the manufacturer's selling price of comparable Australian-made articles of the same varieties ; (h) that the Minister cannot apply by notice the special duty to a whole class when certain varieties of such class are not in fact being manufactured in Australia although such varieties are capable of being made in Australia ; (i) that the Minister cannot lawfully publish a notice under the said sec. 8 of the *Customs Tariff (Industries Preservation) Act* 1921-1922 to apply to future shipments of the specified goods and upon which future shipments no inquiry and report have been made by the Tariff Board ; (j) that the Minister after a general inquiry and report have been made by the Tariff Board into and as to a particular industry cannot by a general notice as in par. 6 hereof lawfully impose the said special duty on goods that are imported into the Commonwealth after the date of the said inquiry and report and notice : all of which contentions are disputed by the defendant.

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The question of law for the opinion of the Court is :—

Whether the plaintiff Company is entitled to receive back the amount of special duty paid under protest by reason of any and, if so, which of the contentions of law raised in the last preceding paragraph.

The parties have agreed that judgment shall be entered for the plaintiff Company for the amount claimed with costs, if the Court answers the said question in the affirmative ; and, if the Court answers the said question in the negative, then judgment shall be entered for the defendant with costs.

The nature of the arguments sufficiently appears in the judgments hereunder.

*Alec Thomson* K.C. (with him *Hammond*), for the plaintiff.

*E. M. Mitchell* (with him *Bowie Wilson*), for the defendant.

*Cur. adv. vult.*



H. C. OF A. The following written judgments were delivered :—

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KNOX C.J. AND HIGGINS J. The plaintiff having sued to recover an amount paid under protest in respect of special duty levied under sec. 8 (2) of the *Customs Tariff (Industries Preservation) Act* 1921-1922, a special case was stated by agreement of the parties for the determination of certain questions of law.

On behalf of the plaintiff Mr. *Thomson* contended (1) that the Act above referred to was obnoxious to the provisions of the first part of sec. 55 of the Constitution ; (2) that sec. 8 of the Act infringed the provisions of the second part of sec. 55 of the Constitution ; (3) that sec. 8 of the Act was invalid as amounting to a delegation of legislative power to an administrative officer ; (4) that the notice No. 157 did not comply with the provisions of sec. 8 of the Act. In our opinion there is no substance in any of these contentions. As to (1)—we can find no provision in the Act which deals with any matter other than the imposition of taxation. Even if there were such a provision, it is clear that it is not to be found in sec. 8, which is directed solely to the imposition of a special duty on goods imported into Australia under the conditions specified in that section. The first part of sec. 55 of the Constitution, which invalidates only provisions dealing with matters other than the imposition of taxation, can have no operation on sec. 8 of the Act or on the Act as a whole. As to (2)—in our opinion the Act deals with duties of customs only. The special duties imposed by the Act are in all cases chargeable on or in respect of goods imported into Australia, and are clearly duties of customs in the ordinary meaning of the expression. If authority be required for this, it may be found in the quotation from *McCulloch's Commercial Dictionary*, referred to by our brother *Isaacs* in *Attorney-General for New South Wales v. Collector of Customs for New South Wales* (1). As to (3)—this point is concluded against the plaintiff by the decision in *Powell v. Apollo Candle Co.* (2). As to (4)—the notice in question is, in our opinion, expressly authorized by the provisions of sec. 8 as explained or interpreted by sec. 13 of the Act.

The question of law formally submitted by the special case should be answered in the negative, and judgment should be entered for the defendant.

(1) (1908) 5 C.L.R. 818, at p. 845.

(2) (1885) 10 App. Cas. 282.



ISAACS J. Notwithstanding Mr. *Thomson's* very earnest and ingenious argument the plaintiff's position is quite hopeless. On four grounds it was contended that the plaintiff should succeed. They were (1) that the first branch of sec. 55 of the Constitution was contravened; (2) that the second branch of that section was contravened; (3) that sec. 90 of the Constitution was infringed; (4) that sec. 8 of the *Customs Tariff (Industries Preservation) Act* (which I shall call "the Act"), properly construed, does not support the *Gazette* notice.

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(1) *Sec. 55, par. 1, of the Constitution*.—The first paragraph of sec. 55 of the Constitution says: "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." The Act, it was urged, runs counter to this provision because, being an Act imposing the special duties, it does not confine itself to the imposition of the duties. No doubt, the constitutional provision provides its own remedy, namely, the invalidity of the "other matter"—that is, other than the imposition of the duties. Reference was made in argument to some observations of mine on sec. 55 in *Attorney-General for Queensland v. Attorney-General for the Commonwealth* (1) and in *G. G. Crespin & Son v. Colac Co-operative Farmers Ltd.* (2). I adhere to what I there said. But, as in this case the alleged "other matter" is necessary to the plaintiff's liability, that consequence, namely, the invalidity of that other matter, would establish the plaintiff's right to succeed. We have, therefore, to examine what is alleged to be "other matter" in order to ascertain whether in truth it is not simply an essential part of "the imposition" of the duties. It was argued that, by empowering the Minister to embark upon an investigation—after an inquiry and report of the Tariff Board—as to the exchange value of the currency of other countries and as to the effect of importation at the prices charged from that country upon Australian industry, and then to publish a *Gazette* notice specifying the country and the goods to which sec. 8 should apply, the Legislature was doing something more than imposing taxation. That, however, is untenable. Parliament may impose taxation absolutely or conditionally. It may select not

(1) (1915) 20 C.L.R. 148, at p. 177.

(2) (1916) 21 C.L.R. 205, at p. 217.



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merely its subjects of taxation but also the conditions, if any, upon which the liability shall arise. In the case of sec. 8 it has chosen to require as conditions precedent to liability the series of events therein stated and to enact that, upon the happening of those events, the special duty provided shall be "charged, collected and paid" in respect of the specified goods. Those events form constitutive facts of liability, and therefore are as essentially elements in the imposition of the taxation as the fixation of the rate. The first point therefore fails.

(2) *Sec. 55, par. 2, of the Constitution.*—The second paragraph of sec. 55 declares: "Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only." The Act, or at least its sec. 8 (which would suffice for plaintiff), it was contended, was invalid because in conflict with this second branch of sec. 55 of the Constitution. That was put in two ways. First, it was said that the special duties were novel duties or extraordinary duties or, at all events, so different in their character as customs duties from the ordinary customs duties with which they are linked by the incorporating effect of sec. 2 of the Act, that the combined Act, as it stands, offends the Constitution by embracing two subjects of taxation. That objection, so far from being supported by the second branch of sec. 55, is directly answered by it. While singleness of subject of taxation is secured in general it was recognized that, in framing Customs and Excise Acts, that general rule would be impossible. Therefore we find the words "except laws imposing duties of customs or of excise." Then the provision requires that "laws imposing duties of customs shall deal with duties of customs only." In the result, so long as a customs law deals only with customs duties, it matters not on what subjects or on what conditions those duties are imposed. Novelty is no objection; for stagnation is not the ruling principle of government. The Constitution, while establishing broad general legislative powers, does not, beyond its express limitations, fetter the Parliament of the Commonwealth in its exercise of those powers to meet the changing circumstances of the Nation. The first objection is,



therefore, met by the express words of the organic law. Then the position was taken that the special duties so called were not really taxation at all but penalties designed to protect Australian industry by exacting from importers a penalizing sum for introducing the goods. This is perhaps the most serious of all the objections urged. It is not rested upon requirements of form or procedure; it goes to the very heart of the matter by challenging the power of the Australian Parliament to impose customs duties for the avowed purpose of guarding national industry from destruction. As no State Parliament could exercise the power, it means that Australian industry must lie at the mercy of foreign importations. As that is put gravely to a Court, it must be answered from a purely legal standpoint. But Courts are not bereft of common knowledge, and are bound to apply that common knowledge to the elucidation of the law. The ordinary customs tariff is framed, as everyone knows, to carry out the decision of Parliament with respect to customs duties both from the aspect of revenue and from that of the development of national industry. But that ordinary tariff is designed to meet normal conditions. If afterwards abnormal conditions unprovided for arise, it is easy to perceive that the ordinary terms of legislation may become inadequate to maintain or secure the results that Parliament has made it its policy to achieve. With that policy we have no concern except to accept it as a fact and apply it as a factor in construing the law, and so to give to an enactment the very force and effect that the language of the Legislature, properly understood, requires. Are, then, these special duties mere penalties? We know that abnormalities may arise in many ways to disturb the ordinary operation of laws. Customs laws, owing to the intense competition of commerce, are among the laws most easily and frequently affected. The ordinary basis of profitable business on which customs laws are mainly founded is frequently deserted, temporary loss being borne speculatively by foreign exporters in order to weaken or destroy competition in the hope of eventual advantage on a clearer field. Dumping is one of the means adopted for this purpose. It is related that many years ago the Dutch controlled the tobacco-pipe production of Europe. Suddenly Flanders opened a factory; and a high tariff protected its

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output from Dutch importations. But, as related also, the Dutch met the occasion: they loaded a ship with pipes, sailed her to Ostend and purposely wrecked her; the pipes were salvaged and sold in Flanders for so little that the new industry perished. That is said to be the classic instance of dumping. Would a higher special duty to meet such a case be a mere penalty? Or would it be a real special customs duty? Methods less crude may, however, be quite as effectual. Some causes are unintentional but are, nevertheless, quite as inimical to national industry, and the ordinary customs tariff is powerless to meet them. To cope with such abnormalities as it thought proper, Parliament has passed this Act, which it calls "An Act relating to certain Special Duties of Customs." One abnormality is provided for in sec. 4—namely, selling to an importer foreign goods at less than the fair market value; another, in sec. 5—namely, selling the goods at less than a reasonable price; a third, in sec. 6—namely, consignment for sale at less than a reasonable price; a fourth, in sec. 7—namely, goods being carried to Australia either freight free or at abnormally low rates of freight. Then by sec. 8 provision is made for abnormally low exchange values. All of these special deviations from the normal course have been met by special duties obviously to preserve the balance of the general policy of Parliament. But for these special provisions, while the ordinary calculation of customs duty would nominally carry out the intention of Parliament, the actual effect might be to undermine it. The fall of foreign currency value is met by sec. 8. It is not a penalty as suggested: it is a precaution. It is not intended as a novel method of penalizing importation distinct from ordinary customs duties: it is a means of preventing evasion of the ordinary effect of the *Customs Tariff* by means of circumstances that were not provided for when that was originally framed, and as it is expected to operate under normal business conditions. In short, it is a special duty for special conditions which is intended to disappear with those conditions, to be replaced by the ordinary duty when ordinary conditions prevail. It is true that the special duty disappears only when the *Gazette* notice is revoked, but Parliament has entrusted the Minister to



determine when those special conditions arise and when they cease to exist. The second objection also fails.

(3) *Sec. 90 of the Constitution*.—We were greatly pressed to say that the Parliament had delegated its power of taxation by investing the Minister with arbitrary power to declare the tax. That, apart from sec. 90, is a cardinal error. Parliament, in committing such power to a Minister, is in no sense abandoning any of its power. It has the fullest control, not only by legislation, but also by the ordinary operation of responsible government—a factor not seldom overlooked—it has complete control over such administrative acts. Any unnecessary or improper exercise of power entrusted to a Minister can be checked or reversed. The Privy Council, it was thought, had for ever settled that question in *Powell v. Apollo Candle Co.* (1). That case decided that in almost analogous circumstances—any difference telling in favour of the validity of the present Act—the tax was imposed, not by the administrative action authorized by Parliament, but by Parliament itself, its law operating upon the administrative event. It was sought to distinguish that case from the present by the terms of the first paragraph of sec. 90 of the Constitution. That paragraph says: “On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.” The word “exclusive” was relied on to support the view that no administrative act whatever can be made a factor in creating liability to customs duties. So impracticable a position is not within the contemplation of sec. 90. It was framed for a well-known purpose, which appears on the face of the section read in its collocation. The word “exclusive” means simply exclusive of State Parliaments, “exclusive” as opposed to concurrent, “exclusive” in the sense in which that word is found in secs. 52 and 107. It was not intended to limit the ambit of Commonwealth parliamentary power but to make that power exclusive on the subject matter. It has no function of hampering the Parliament in utilizing the necessary offices of the Executive Department as an aid in effecting its objects. This contention cannot be sustained.

(1) (1885) 10 App. Cas. 282, particularly at p. 291.

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(4) *Construction of Sec. 8.*—The last contention is that the power to specify goods is confined to some specific importation. It is that each importation, each shipment, is intended to be the subject of a separate inquiry and report by the Tariff Board, a separate investigation by the Minister, and a separate *Gazette* notice. It is sufficient to say that the words and the general sense of sec. 8 would, in my opinion, be enough without outward aid to subvert that view. But, in truth, the matter has been placed beyond controversy by sec. 13, which applies (*inter alia*) to sec. 8 and interprets and declares the power of specifying in a manner entirely opposed to the limiting contention in hand. Sec. 8 itself, and certainly when read with sec. 13, gives the general power claimed. The *Gazette* notice is framed in the widest way to have effect as to all goods of the nature specified “on and from 8th February 1924.”

In the result the question in the case must be answered in the negative and, in accordance with agreement, judgment entered for the defendant.

I am authorized by my brother *Starke* to say that he concurs in this judgment.

RICH J. I have had an opportunity of reading the judgment of my brother *Isaacs*, and, as I agree with the reasons contained in it, I am content merely to state that I agree that the question submitted should be answered in the negative and judgment entered for the defendant with costs.

*Question answered in the negative. Judgment entered for the defendant with costs.*

Solicitor for the plaintiff, *Stephen Ahern*.

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

B. L.