[HIGH COURT OF AUSTRALIA.]

WILLEY . . . . . APPELLANT;
PLAINTIFF,

AND

SYNAN . . . . . RESPONDENT.
DEFENDANT,

H. C. OF A. 1936-1937.

MELBOURNE, 1936, *Oct.* 30.

Starke J.

MELBOURNE, 1937, *Feb.* 23; *Mar* 3; *June* 2.

Latham C.J., Rich, Dixon, Evatt and McTiernan JJ.

Customs—Action for recovery of seized goods against Collector of Customs—Action brought after notice by collector under sec. 207 *of Customs Act—Onus of proof—Forfeiture—Goods "not satisfactorily accounted for"—Customs Act* 1901-1935 (*No.* 6 *of* 1901—*No.* 7 *of* 1935), *secs.* 207, 229 (*e*).

Personal property—Possession—Goods found on ship by member of crew—Whether possession in finder.

On the arrival of a ship at Melbourne the captain informed the customs officers that certain English silver coins had been found on board on the voyage between Dunedin and Melbourne. The coins were thereupon taken into the possession of the customs authorities. The plaintiff, who was the boatswain of the ship, claimed to have been the finder of the coins and demanded them from the Collector of Customs. Notice was given by the Collector of Customs, pursuant to sec. 207 of the *Customs Act* 1901-1935, requiring the plaintiff to enter an action for the recovery of the coins and intimating that otherwise they would be deemed to be condemned without further proceedings. On such action being brought against the collector the defendant disputed the claim of the plaintiff that he was entitled to the coins as finder and further claimed that they were forfeited to the King by virtue of sec. 229 (*e*) of the *Customs Act* 1901-1935. At the trial of the action before *Starke* J., evidence was given by an officer of the ship's agents of a report to him by the captain of the ship that the coins had been found on board by the plaintiff and handed over to the captain, but the plaintiff did not give evidence himself and there

was no direct evidence on oath that the plaintiff found the coins. Judgment of nonsuit was directed to be entered. The plaintiff appealed to the Full Court.

Held :—

(1) By *Latham* C.J. and *Dixon* J. (*Evatt* J. dissenting), that, notwithstanding that the action was brought in consequence of the collector's notice under sec. 207 of the *Customs Act* 1901-1935, the onus of proving his claim that he had found and acquired possession of the coins lay upon the plaintiff; and, by *Latham* C.J., that, the captain's report being inadmissible in evidence against the defendant, the plaintiff had not discharged that onus.

Willey v. *Synan*, (1935) 54 C.L.R. 175, considered.

(2) By *Rich* and *Dixon* JJ., that, assuming that the evidence established that the plaintiff found the coins, he had never had possession of them. By *Dixon* J., that the possession taken was that of his employers, the owners of the ship.

Bridges v. *Hawkesworth*, (1851) 21 L.J. Q.B. 75, *South Staffordshire Water Co.* v. *Sharman*, (1896) 2 Q.B. 44, and *M'Dowell* v. *Ulster Bank*, (1899) 33 Ir.L.T. Jo. 223, considered.

(3) By *Latham* C.J., *Dixon* and *McTiernan* JJ. (*Evatt* J. dissenting), that, even if the plaintiff had acquired possession, the coins were not "satisfactorily accounted for" within the meaning of sec. 219 (*e*) of the *Customs Act* 1901-1935 in that no satisfactory explanation was given of their presence on the ship, and the Collector of Customs was therefore entitled to retain them as forfeited to the King under that section.

Held, accordingly, by *Latham* C.J., *Rich*, *Dixon* and *McTiernan* JJ. (*Evatt* J. dissenting), that the appeal should be dismissed.

APPEAL from *Starke* J.

Samuel Charles Willey brought an action in the High Court against Maurice Bernard Synan, the Collector of Customs for the State of Victoria, claiming the return of certain silver coins valued at £351 5s. and damages for their wrongful detention.

The statement of claim was, in substance, as follows :—

1. The plaintiff was at all material times a member of the crew of the steamship *Piako*.

2. On 21st August 1933, whilst the steamship was in mid-ocean bound from Dunedin to Melbourne, the plaintiff found on board or was possessed of or the owner of English coins totalling in value £351 5s.

3. On the arrival of the steamship *Piako* at Melbourne the silver coins were taken into the possession of officers of the Customs Department.

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4. The plaintiff has demanded of the Customs Department the return to him of the silver coins to which he is entitled but the coins have not been so returned.

5. The plaintiff has received from the defendant the following notice :—" Whereas by notice in writing dated 20th September 1933 you have by your agent . . . claimed the sum of £351 5s. seized as goods forfeited to His Majesty pursuant to sec. 229 (*e*) of the *Customs Act* 1901-1935 ; Take notice that pursuant to sec. 207 of the said Act I hereby require you to enter an action against me for the recovery of the said goods and further take notice that if you shall not within four months after the date hereof enter such action the said goods shall be deemed to be condemned without any further proceedings. M. B. Synan, Collector of Customs, Victoria."

6. The plaintiff claims the return of the silver coins together with damages for the wrongful detention thereof.

The defendant, by pars. 1 to 5 of his defence, admitted that the plaintiff was a member of the crew of the *Piako* at the time in question, that on arrival of that ship in Melbourne a bag containing English silver currency of a value of £351 5s. was seized on the ship by officers of customs, that the plaintiff had demanded delivery of the English currency and that it had not been returned to him. Otherwise the defendant did not admit the allegations contained in the statement of claim. The defendant further alleged :—

6. The bag and its contents are " goods " within the meaning of that word in sec. 229 (*e*) of the *Customs Act* 1901-1935 and were for the purposes of the sub-section found on the steamship after its arrival in Melbourne on 24th August 1933.

7. Neither the bag nor its contents were specified or referred to in the inward manifest of goods carried on the ship on its arrival in Melbourne on 24th August 1933, nor were they baggage belonging to the crew of the ship or passengers thereon, nor were they satisfactorily accounted for.

8. By virtue of sec. 229 (*e*) of the *Customs Act* 1901-1935 the bag and its contents became forfeited to His Majesty the King, and their seizure by the officers of the customs was a lawful seizure under that Act.

9. The plaintiff is not entitled to the possession of the bag or its contents nor was he so entitled when the bag and its contents were seized.

10. The defendant will object that the statement of claim is bad in law and discloses no cause of action against him on the ground that the facts alleged therein, if proved, establish no right in the plaintiff to the possession of the English silver coins, the return of which is claimed.

The New Zealand Government and the owner of the ship also claimed the coins but these claims were subsequently withdrawn.

Further facts appear in the judgment of *Starke* J., who tried the action, and in the judgments on appeal hereunder.

Fraser, for the plaintiff.

Herring K.C., for the defendant.

STARKE J. delivered the following judgment:—

On the evidence as it stands there must be judgment of nonsuit. The action has been pending since the year 1933. But the plaintiff himself has given no evidence of the finding of the coins. The court is asked to infer it from the fact that the captain of the *Piako* said in a report to Weir, an employee of McIlwraith McEacharn Ltd., that the boatswain found the coins in the forepeak of the vessel, and from the fact that the plaintiff was the boatswain. There is no proof—no evidence on oath—of the finding of the coins by the plaintiff; there is merely a report that money was found, and it was said to have been found by Willey. The documentary evidence tendered contains statements or reports made to or by officers in the Customs Department, who are not speaking from their own knowledge of facts. Neither the finding of the coins by the plaintiff nor his possession of those coins is proved to my satisfaction. As to Mr. *Fraser's* suggestion that the claims to the coins made by McIlwraith McEacharn Ltd. and by the New Zealand Government were abandoned, all I have to say, if it were a fact, is that they were not abandoned in favour of the plaintiff. I direct judgment of nonsuit to be entered. Plaintiff to

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pay the costs of the action. Set-off costs against any costs that may have been awarded to the plaintiff in this action. Refuse stay of proceedings.

From this decision the plaintiff appealed to the Full Court.

Fraser, for the appellant. The customs authorities did not know what to do with the coins when they were handed in. Claims were made by the shipowner, by the New Zealand Government and by the boatswain who found the coins on the ship. The claims of the shipowner and the New Zealand Government were not proceeded with. The coins were not "found" within sec. 229 (*e*) of the *Customs Act* and they were "baggage" belonging to a member of the crew and the boatswain satisfactorily accounted for them. The Collector of Customs gave notices to the claimants to make claims. This procedure was adopted because there were a number of adverse claims made to the coins. The undisputed facts were that the plaintiff was a member of the crew of the *Piako* and was boatswain of the ship and on the arrival of the *Piako* in Melbourne from Dunedin certain English coins were in the possession of the master of the ship. Those English coins had been found on board in mid-ocean and were handed by the master of the ship to the customs officer who still retains them. The coins were not goods assessable for duty or primage and were, therefore, not forfeitable goods. The correspondence shows that the plaintiff asserts that he found the goods and there is no denial of those facts. There is no evidence that these coins were put on board in New Zealand. The report by the master is admissible and can be proved by the person who was present at the conversation. The statement is admissible as showing the character of the master's possession, namely, that he was holding them on behalf of Willey and not on his own behalf, or it is admissible as a statement by a person in possession of property qualifying his own title to it (*Phipson, Law of Evidence*, 6th ed. (1921), p. 238; *Ivat* v. *Finch* (1); *Doe d. Foster* v. *Williams* (2); *La Roche* v. *Armstrong* (3); *Wigmore* on *Evidence*, 2nd ed. (1923), vol. III., pp. 619, 796, 797;

(1) (1808) 1 Taunt. 141; 127 E.R. 785.

(2) (1777) 2 Cowp. 621; 98 E.R. 1273.

(3) (1922) 1 K.B. 485. at p. 490.

Doe d. Hindly v. *Rickarby* (1)). Once the boatswain here proves possession, title in him is presumed (*Smith* v. *Smith* (2)). The goods were not " found " within the meaning of sec. 229 (*e*). " Found " there means discovered by the customs officer on board the ship, lying about without any apparent owner. The goods may be " satisfactorily accounted for " if a person shows that he is in possession, though such possession may have been wrongfully obtained. The claimant does not have to prove that he came into possession honestly. These goods were accounted for by the master of the ship telling the customs officer that the goods were found on the ship. The coins do not lose their character as " baggage " of the crew because of the amount. They were " baggage " within the meaning of that section. The goods were not " found " on the ship " after arrival." They were " baggage belonging to the crew " and were " satisfactorily accounted for " within the meaning of sec. 229 (*e*) of the *Customs Act* 1901-1935.

Herring K.C. (with him *Moore*), for the respondent. There was no proof given by the appellant connecting him with the goods at all, and, assuming that the statement of the master to Weir could be looked at, it does not establish in the appellant any right which could be given effect to. The legal possession of the coins was in the owner of the ship from the moment they were found and when the appellant handed the goods over his possession, which was *de facto* only, came to an end. The evidence disclosed facts which justified seizure of the coins and they should be condemned. It appears only in Weir's evidence that the appellant was the finder of the coins and there is no other evidence as to his finding the coins. The statement in Weir's report can only be put in as an admission, and there is no identity of interest between the appellant and the person who made the admission. Here, there is a seizure by a customs officer which effectively breaks the chain of title derived by the finding. The claim made by the respondent is an adverse claim to that of the appellant. It is not part of the *res gestae* (*Wigmore* on *Evidence*, 2nd ed. (1923), vol. III., pp. 786, 787). The master is not describing or explaining possession (*Halsbury, Laws of*

(1) (1803) 5 Esp. 4; 170 E.R. 718. (2) (1836) 3 Bing. (N.C.) 29; 132 E.R. 320.

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England, 2nd ed., vol. 13, p. 580, sec. 654). There was no evidence to connect the appellant with the coins at all, but assuming that there was evidence that the appellant, while on duty, had found the coins at sea and had handed them to the master, that would place the legal possession of the coins in the owner of the ship (*South Staffordshire Water Co.* v. *Sharman* (1)). The general presumption as to goods on the ship which cannot be regarded as personal belongings of the crew is that they do not belong to them, but to the shipowner. The declaration of the appellant that he found the goods was not admissible as proof of his claim to the coins. Declarations accompanying acts are admissible only in a very limited class of cases. They are not admissible to prove the facts stated (*Phipson* on *Evidence*, 7th ed. (1930), pp. 56, 58, 59 ; *Taylor* on *Evidence*, 12th ed. (1931), vol. I., p. 373). In any event the declarations are only as to past events (*Pollock and Wright* on *Possession in the Common Law* (1888), p. 60 ; *Bridges* v. *Hawkesworth* (2)). The goods were seized by the customs as forfeited goods (*Customs Act* 1901-1935, sec. 203 ; *Buckley* v. *Gross* (3)). [Counsel referred to the *Customs Act*, secs. 31-33, 41, 49 and 64.] " Found " in sec. 229 (*e*) does not imply any search but has the same meaning as in the *Licensing Act*, which refers to persons found on the premises.

Fraser, in reply. *Buckley* v. *Gross* (3) was considered in *Field* v. *Sullivan* (4). *South Staffordshire Water Co.* v. *Sharman* (1) is not an authority for the proposition that the owner of the ship is entitled to the coins (*Goodhart, Essays in Jurisprudence and the Common Law*, (1931), ch. 4). The trial judge did not find that the appellant did not find the goods in the course of his employment. The circumstances here are different from a housemaid finding goods on the premises of her employer. It is like the finding of goods in a public shop (*Clerk and Lindsell* on *Torts*, 8th ed. (1929), p. 240). Having regard to the definition of owner in the *Customs Act* and the resort by the plaintiff to this procedure, the customs are estopped from taking up the position that the plaintiff is not the owner or entitled to possession. The object of the *Customs Act* is

(1) (1896) 2 Q.B. 44.
(2) (1851) 21 L.J.Q.B. 75.
(3) (1863) 3 B. & S. 566 ; 122 E.R. 213.
(4) (1923) V.L.R. 70. at p. 84 ; 44 A.L.T. 117. at p. 123.

to prohibit goods entering into Australia or for the imposing of conditions on the entry of goods. It is not intended by that Act that the customs authority can take and forfeit any goods found on board the ship.

Cur. adv. vult.

June 2.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a judgment given for the defendant by his Honour Mr. Justice *Starke* in an action in which the plaintiff sued the defendant for the return of certain English coins totalling in value the sum of £351 5s.

The plaintiff alleged in his statement of claim that he was a member of the crew of the steamship *Piako* and that on 21st August 1933 on the high seas between New Zealand and Victoria the plaintiff found on board or was possessed of or was the owner of the coins in question. He alleged, and it was proved, that on the arrival of the steamship at Melbourne the coins were taken into the possession of an official of the Customs Department. He claimed the coins, and the defendant, the Collector of Customs for Victoria, served upon the plaintiff a notice under sec. 207 of the *Customs Act* 1901-1935 requiring the plaintiff to enter an action against him, the collector, for the recovery of the coins which had been seized by the customs officer. Sec. 207 provides that, if goods have been seized by a customs officer and a notice under the section is served upon the claimant, and he shall not within four months after the date of the notice enter an action against the collector for the recovery of the goods, the goods shall be condemned without any further proceedings. The defendant admitted that the plaintiff was a member of the crew of the *Piako*, that the customs officer seized the bag of coins, and that the defendant had refused to deliver the coins to him after his demand. The defendant did not admit that the plaintiff found the coins or that he was possessed of them or was the owner of them. The defendant also relied upon sec. 229 (*e*) of the *Customs Act*.

The writ was issued on 16th November 1933 and the trial took place on 30th October 1936. The plaintiff was not called as a

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witness. The plaintiff's right rested entirely upon proof of the allegation that he had been in possession of the coins. *Starke* J. held that there was no evidence on oath of the finding of the coins by the plaintiff and that it was not proved that he had ever been in possession of the coins. Accordingly judgment was given for the defendant.

In *Willey* v. *Synan* (1) the court held that legal process was initiated in this matter by the notice given by the defendant so that the onus of actually taking proceedings was placed upon the plaintiff in order to avoid condemnation of the coins as forfeited to the Crown. For this reason it was held that the plaintiff should not be ordered to give security for costs. In my opinion this decision does not render it any the less necessary for the plaintiff, when he has taken proceedings, to establish his case that he was entitled to the coins as the finder of them. If he had given no evidence, his action would necessarily have failed.

The plaintiff relies upon the proposition for which *Armory* v. *Delarmirie* (2) is authority, namely, that the finder of goods (including money) is entitled to the goods as against all persons except the true owner. The first question to be determined is whether there was evidence that the plaintiff found the goods or was ever in possession of the goods. There was no direct evidence on oath of either of these facts. There was, however, evidence given by an officer of the ship's agents that after the arrival of the ship at Melbourne the captain told him that a bag of coins was found by the boatswain in the forepeak of the vessel, and was handed to him and locked up by him in the ship's safe, and that they were found in a vegetable bag on the voyage from Dunedin to Melbourne. On the following day a customs officer took possession of the coins. So far as this evidence is concerned it amounts to a statement by a witness that the captain, who was not called as a witness, said that the boatswain found the coins and handed them to him. It was proved that the plaintiff was the boatswain. Is this statement of the captain, a statement itself not on oath, evidence that Willey had found the coins and that he handed them to the captain?

(1) (1935) 54 C.L.R. 175.

(2) (1722) 1 Stra. 505; 93 E.R. 664.

The evidence also includes internal departmental reports in which it is stated that the master of the vessel reported that the coins had been found on the ship, but not that the plaintiff had found them and handed them to him. These reports, if properly admissible, do not add anything to the plaintiff's case.

It is contended on behalf of the plaintiff that the sworn evidence that the captain had stated that the boatswain found the coins is evidence that the boatswain did find the coins and was in possession of them as finder. This is not a case of a declaration by a deceased person but of a declaration by a living person who is not called as a witness, the declaration relating to a fact of which there is no evidence *aliunde*. In my opinion the evidence of the declaration made by the captain is not admissible. Declarations made by a person who is not a witness may be admitted to explain a fact in issue which they accompany but not to explain previous or subsequent facts (*Hyde* v. *Palmer* (1)). Thus the declaration made by the captain in Melbourne cannot be admitted under this rule to prove the alleged fact that the boatswain some days before either found the coins or delivered the coins to him. It is impossible to regard the declaration in question as contemporaneous with the alleged acts or facts of finding or delivery by the plaintiff. Such a declaration cannot be used to establish the fact to which it relates, but only to explain it if that fact is established by other evidence (See the discussion in *Phipson* on *Evidence*, 6th ed. (1921), Bk. 2, c. 6, sec. 5, under the head of " Accompanying Facts ").

It is also argued on behalf of the plaintiff that evidence of a declaration by the captain who was in possession of the goods is admissible against the defendant because it explains or qualifies the captain's possession (*La Roche* v. *Armstrong* (2)). This rule applies to make such evidence admissible as against a party claiming through the declarant (*Smith* v. *Smith* (3) ; *In re Holland* ; *Gregg* v. *Holland* (4)). There is no authority for applying the rule where, as in this case, the other party to the action is not in any way identified in interest with the declarant. In this case the defendant does not claim through or under the captain or the owner of the

(1) (1863) 3 B. & S. 657 ; 122 E.R. 246.
(2) (1922) 1 K.B., at p. 490.
(3) (1836) 3 Bing. (N.C.) 29 ; 132 E.R. 320.
(4) (1902) 2 Ch. 360, at p. 379.

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ship. The defendant resists the claim of the plaintiff not upon the ground that the defendant or the Commonwealth obtained the goods from the captain and therefore has all his rights (but no more than his rights) whatever they were, but on the contrary, on the alleged ground that the Commonwealth is entitled by virtue of a title paramount to forfeit the goods as against all persons under sec. 229 of the *Customs Act* because, it is said, the goods fall within par. *e* of that section.

Thus, in my opinion, the decision of the learned judge was right on the ground that there was no evidence that the plaintiff was the finder or was ever in possession of the goods.

It should further be observed that the declaration made by the captain of which evidence was given was only a statement that the captain received the coins from Willey who had found them, not that he was holding them on account of Willey. It is quite consistent with the truth of the declaration that Willey was ordered by the captain to make a search of the ship, that he found the coins in the course of that search and that, in accordance with what he conceived to be his duty, he delivered the things which he found in the search to the captain. Thus, even if the evidence were regarded as admissible, it would not prove that the captain received or held the coins on behalf of Willey.

Further, if it were proved that the plaintiff found the coins on the ship and handed them to the captain who agreed to keep them for him, the plaintiff still would not, in my opinion, be entitled to succeed. Sec. 229 (*e*) of the *Customs Act* is in the following terms:—"The following goods shall be forfeited to His Majesty:— . . . (*e*) All goods found on any ship or aircraft after arrival in any port or aerodrome and not being specified or referred to in the Inward Manifest and not being baggage belonging to the crew or passengers and not being satisfactorily accounted for." The coins were found on a ship after arrival in the port of Melbourne, they were not specified or referred to in the inward manifest, they were not baggage belonging to the crew or passengers. On Willey's own case it is clear that they did not belong to him as his baggage—they were found by him in a bag of vegetables. They were not, if all the evidence tendered by him is accepted, the baggage of any

person on the ship. The only question upon which it appears to me that there is any real room for argument is whether the goods were or were not satisfactorily accounted for within the meaning of the section. It has been argued that the coins were satisfactorily accounted for when Willey said that he found them—at least, that they were satisfactorily accounted for if this statement were true. In my opinion, however, what has to be satisfactorily accounted for is not the existence of the goods or the possession of them by a particular person when they are found after the arrival of the ship, but the presence of the goods on the ship. It is not sufficient for a person to say " I found these goods on the ship " in order to avoid the application of sec. 229 (*e*). The question to be answered, and to be answered satisfactorily, is : " How does this thing come to be on this ship ? " To say " I found it here " only states the fact to be explained, plus the circumstance that the finder became aware of the fact, and does not explain it. Such a reply does not account at all for the presence of the goods on the ship. Further, the goods can be satisfactorily accounted for only if it can be shown that they are lawfully on the ship. Thus a person who tries to smuggle goods and repents may give a complete account of the origin, manufacture and history of the goods, explaining precisely how he got them and how he brought them on board the ship, and showing exactly why they are, at the time when they are discovered, in a particular portion of the ship. Let it be supposed that the explanation is true. Such an explanation accounts completely for the goods in a causal sense, but it does not satisfactorily explain the presence of the goods having regard to the provisions of the *Customs Act* directed against smuggling. Although a person completely explains all the matters to which I have referred and demonstrates beyond any doubt that he is the true owner of the goods, his goods may be forfeited under sec. 229 (*e*) if the account which he gives explaining their presence on the ship is not satisfactory. It is, I think, for a court, when the matter comes before a court, to decide whether goods are satisfactorily accounted for, just as it is for a court to determine whether they were referred to in the inward manifest or were baggage of the crew or passengers. In this case no account is given explaining the presence of the goods on the ship.

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In my opinion, in the present case the goods were not satisfactorily accounted for in the relevant sense and as all the other requirements of sec. 229 (*e*) are satisfied the goods were forfeited to His Majesty under this section.

In my opinion the appeal should be dismissed.

RICH J. The embarrassment of the real owner, whoever he may be or have been, of the bags of coins discovered in the forepeak of the s.s. *Piako* in her voyage across the Tasman Sea has proved sufficient to prevent him coming forward and claiming the silver notwithstanding its pecuniary value. Neither the plaintiff nor the shipowners nor the Commonwealth have experienced any embarrassment from the circumstances affecting their part in the discovery and subsequent dealing with the money. The shipowners did not persist in their claim and the issue of who shall have the money is now restricted to the plaintiff and the Commonwealth. The Commonwealth have the advantage of coming within the apothegm "*Beati possidentes*" which, if it be not a legal maxim, embodies a legal truth. The plaintiff's difficulties in getting a foothold in the law are reflected in his pleader's uncertainty. Much inadmissible evidence was led to prove that the plaintiff discovered the money concealed in the forepeak of the ship and handed it to the ship's captain. I am not prepared to say that, after a meticulous sifting of the inadmissible from the admissible, there might not remain a residue from which an inference could be drawn supporting these allegations. But even so I fail to see how the plaintiff got possession of the goods so as to maintain detinue, trover or trespass against the officers who seized the money, assuming their seizure was unjustified. He seems to me to be in the ordinary position of a ship's steward "finding" articles which passengers have mislaid or concealed and handing them to the purser. It is incredible to me that, if the passenger cannot be found, the steward is entitled to claim the property. I have no doubt that in the present case the silver was anything but lost. Its whereabouts was well known to somebody or other on the ship and that unknown person had, I imagine, possession in law until, by the action of the captain in taking over the coins and securing them in the ship's safe, possession

rested in him or his owners. I cannot see why, because it may be doubtful whether the customs authorities had a right to forfeit the coins and the shipowners have not persisted in their claim, the boatswain can come forward and recover from the Commonwealth what he could not recover from the shipowners or the captain. Without going into the question whether sec. 229 (*e*) of the *Customs Act* applies I think that on this ground the plaintiff's claim fails.

The appeal should be dismissed.

DIXON J. The British steamship *Piako* on a voyage from Newport News in the United States of America to Melbourne called at Dunedin, New Zealand. She carried cargo and no passengers. The ship's company numbered sixty-three. She cleared on 18th August 1933 for Melbourne where she reported six days later. At that time the exportation from New Zealand of silver coins was forbidden. The master of the vessel informed the ship's agents that on the voyage from Dunedin a bag of English silver coins had been discovered, and that he had locked them in the ship's safe. The silver coins amounted to £351 5s. Officers of customs then took possession of them, the master expressing doubt as to their authority to do so. The ship's agents on behalf of the master and owners at once protested and next day propounded a claim to the money on behalf of the owners.

The Government of New Zealand requested the Customs to deliver the coins to its representative, on the ground that under New Zealand law the exportation of silver money was prohibited and coins exported in contravention of the prohibition became forfeited to the Crown in right of New Zealand.

Then the appellant, who is plaintiff in the action, put forward a claim to the money. He was boatswain of the ship, and, according to evidence admitted subject to objection, it was he who discovered the coins; he found them in the forepeak in the course of a search for stowaways and he handed them to the master.

The Customs dealt with the claims by proceeding under sec. 207 of the *Customs Act* 1901-1935. The collector served on each of the three parties claiming the money a notice requiring the claimant to enter an action against him for the recovery of the goods and stating

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that, if such action was not entered within four months, the goods would be deemed condemned without any further proceeding. Neither the shipowner nor the Government of New Zealand brought an action. But the appellant responded to the notice by issuing the writ in the present action. He left the jurisdiction but the action was allowed to proceed without his giving security (1). The appellant was not present at the trial and in the absence of his testimony a nonsuit was granted on the ground that no proof by admissible evidence had been given that he had found the coins, or that they had come to his possession.

He appeals from the nonsuit.

Although the action is brought in consequence of the collector's notice, it was, in my opinion, incumbent upon the appellant as plaintiff to offer evidence of his title to possession of the coins. It is true that the appellant was under the necessity of bringing the action if he wished to avoid the forfeiture of the coins and the consequent extinguishment of any claim or interest to which he might otherwise be entitled. We have already held that, for this reason, he cannot be considered an actor putting the law in motion and so bound, unless his residence is within the jurisdiction, to give security for costs. We thought that his position resembled that of a claimant in the proceedings which the common law prescribed when goods were seized as forfeited. But even in these proceedings, the nature of which we then stated (2), the claimant could not obtain the goods without moving for a writ of delivery, and presumably that writ would not have been awarded to one unable to show, even as against the officers seizing erroneously, any title to be placed in possession of the goods.

Secs. 203 to 208 of the *Customs Act* 1901-1935 provide a statutory substitute for the procedure required by the common law. The Crown or its officers must still take the initiative. But they need not originate judicial proceedings. Under secs. 244, 245 and 247 the Crown, if it choose, may itself take curial proceedings to obtain a condemnation, but it is no longer necessary for it to do so. If it does take judicial proceedings for a condemnation, then sec. 255 makes the averments in its pleadings prima facie evidence of the

(1) (1935) 54 C.L.R. 175.

(2) (1935) 54 C.L.R., at pp. 181, 186.

facts alleged. The alternative provided by secs. 203 to 208, in effect, substitutes steps out of court for the steps in the Court of Exchequer which preceded the making of claims by those setting up a title to the goods. The goods must be taken to the nearest King's warehouse or other place of security (sec. 204). Notice must be given of the seizure so as to enable the owner to make a claim, unless he was present at the seizure (sec. 205). "Owner" is defined to include any person possessed of or having any control of goods (sec. 4). If the person from whom the goods have been seized, or the "owner" does not within one month of the seizure give the collector notice in writing that he claims them, they shall be deemed to be condemned (sec. 205). If a claim is made, then the claimant may be required to sue to recover the goods and, if he does not do so, in that case also the goods are deemed to be condemned (sec. 207). If the claimant does sue, his action must be for the recovery of the goods (sec. 207).

Thus, to avoid forfeiture he must bring an action of a known kind in which he seeks to enforce some right to possession of the goods. He is at least in no better position than the claimant in a proceeding for condemnation. Like any other plaintiff in an action for recovery of goods, he must show that prima facie he has a right to their possession as against the defendant, which means that, apart from the forfeiture or any other legal justification for the seizure, he would be entitled to recover the goods from the officers seizing them. Sec. 207 gives no new right of action to anyone. It supposes that, unless the goods are liable to forfeiture, the seizure will or may be actionable and it puts the party claiming to his remedy by action. Thus, in the present case, if the party entitled to the coins apart from the alleged grounds of forfeiture is the New Zealand Government or the shipowner, the failure of either of them to sue in response to the notice under sec. 207 will extinguish the title to the goods and vest them in the Commonwealth as effectually as if they were judicially condemned. If, on the other hand, the appellant has a title to the goods, that is, would be entitled to recover them apart from the alleged grounds of forfeiture, his institution of the action has the effect of preventing the operation of sec. 207 as an extra-judicial condemnation. The existence of the grounds of

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forfeiture must then be judicially found in order to bar his right. But I think that it necessarily follows that he must prove his title to possession of the goods, apart from the forfeiture. To avoid the nonsuit, therefore, it was necessary for the appellant to adduce evidence of such a right to possession of the goods as would entitle him to recover from a person seizing them without statutory or other lawful authority. This, in my opinion, he failed to do.

I assume that, among the materials admitted in evidence including those admitted subject to objection, there can be found admissible evidence of circumstances sufficient to support or authorize an inference that it was the plaintiff who discovered the coins and handed them to the master. It is unnecessary for me to examine the correctness of the assumption. If the facts are what the plaintiff sought to prove, he must, in my opinion, fail. He must fail because the facts show that he never obtained a possession of the coins entitling him to recover them even if there had been no forfeiture. But he must fail for the further reason that under sec. 229 (*e*) the same facts would, as I think, expose the goods to forfeiture. It is an important consideration that the goods were concealed in the ship and that this was done for the purpose of exporting them from New Zealand, and, as I think should be inferred, for the purpose of introducing them into Australia. They were not lost. They were stowed where their owner or his agents believed he or they could obtain them and that owner by himself or his agents entertained an intention of exercising over the coins such control and disposal as opportunity might allow. When the plaintiff, as the ship's boatswain, discovered the coins and handed them to the master, he was the instrument by which this opportunity for control and disposal was displaced in favour of the master. It does not appear what passed between the boatswain and the master when the latter took the coins into his keeping. But it is not to be supposed that the plaintiff asserted any independent possession of his own. The concealment of goods on a ship for the purpose of clandestine carriage is a matter that concerns the master and owners. It would be inconsistent with the duties of a member of the ship's company to deal with goods so concealed on his own account. Although it may be taken that he found the coins, it does not

appear that he took even manual custody of the bags of money. But if he did, it could amount only to custody and not to possession. The possession taken was that of the owners, unless it be still true that a ship is in the possession of the master.

In *M'Dowell* v. *Ulster Bank* (1) the porter of a bank, sweeping up the banking chamber after the hours of business, found a roll of notes near the tables where customers wrote out cheques. The porter handed the notes to the manager, but afterwards, on the true owner's failing to appear, he sought to recover the money from the bank. *Palles* C.B. said :—" I decide " the case " on the ground of the relation of master and servant, and that it was by reason of the existence of that relationship and in the performance of the duties of that service that the plaintiff acquired possession of the property. I conceive that it is the duty of the porter of the bank, who acts as caretaker, to pick up matters of this description, and to hand them over to the bank. I hold that the possession of the servant of the bank was the possession of the bank itself, and that, therefore, the element is wanting which would give the title to the servant as against the master. He relies as against his master on the possession. In this case it was the possession of the bank, and the servant held the notes as servant " (2).

Palles C.B. was careful to say that he did not decide the case on the ground laid down by Lord *Russell of Killowen* C.J. in *South Staffordshire Water Co.* v. *Sharman* (3). That ground was expressed by Lord *Russell* as " the general principle . . . that where a person has possession of house or land, with a manifest intention to exercise control over it and the things which may be upon or in it, then, if something is found on that land, whether by an employee of the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the *locus in quo* " (4).

Professor *Goodhart* has shown how difficult it is to reconcile this general doctrine with the ground upon which the well-known case of *Bridges* v. *Hawkesworth* (5) was actually decided, as distinguished from the grounds upon which it has since been justified or explained (*Three Cases on Possession, Cambridge Law Journal* (1928), p. 195;

(1) (1899) 33 Ir. L.T. Jo. 223.
(2) (1899) 33 Ir. L.T. Jo., at p. 226.
(3) (1896) 2 Q.B. 44.
(4) (1896) 2 Q.B., at p. 47.
(5) (1851) 21 L.J.Q.B. 75.

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Essays in Jurisprudence and the Common Law (1931), p. 75). For *Patteson* J. in delivering the judgment of the Court of Queen's Bench in the latter case, expressly relied upon a supposed general rule that the finder of a lost article is entitled to it as against all persons except the real owner, and said that it was a mistake to hold that the place in which it was found makes any legal difference.

In many jurisdictions the generality of this principle, or supposed principle, has been pressed very far. For instance, in Ontario a decision has been given that a salesman employed in a shop is entitled as against the shopkeeper to a roll of bank notes, dropped on the floor by someone who failed to claim them, which the salesman afterwards picked up. The judgment of *Palles* C.B. was distinguished on the ground that to pick up articles found on the floor of the bank and hand them to the manager was part of the porter's duty (*Haynen* v. *Mundle* (1)).

The development of the doctrine in the United States has produced some consequential refinements. A distinction is drawn between the case in which the owner has intentionally laid down or deposited articles on the premises of a stranger with the intention of taking them up or resuming custody of them and has forgotten to do so or has failed to remember where he had put them, and the case in which the articles are dropped or involuntarily parted with. In the former case, it is said, they may be regarded as having been left within the protection of the occupier of the premises and if they are found by a servant he obtains no possessory right superior to his master's. But, in the latter case, they are truly lost and the finder obtains a possession good against all but the true owner (See note to *Weeks* v. *Hackett* (2). See, further, the cases cited under " Lost Property " in 17 *Ruling Case Law*, p. 1198, and *Harvard Law Review*, vol. 46, p. 716).

The distinction is open to the objection that the rights of the finder must depend on his acquisition of possession and his acquisition of possession must depend not on the manner in which the true owner came irremediably to relinquish control of the article, but on the existence of a prior right of possession in the occupier of the

(1) (1902) 22 Can. L.T 152, 153.
(2) (1908) 104 Me. 264; 129 Am. St. R. 390, beginning p. 400, particularly p. 402.

premises, and, in cases of master and servant, upon the scope of the servant's duties. If a theory of possession is adopted in which the animus is an intent to exclude others, the theory ascribed to the common law by Mr. Justice *Holmes* (*Holmes, Common Law* (1881), p. 220), then it would be enough that the occupier intended to exclude others from the premises and all things therein contained. But if possession depends upon an *animus domini*, the intention of the true owner temporarily to leave his chattel within the protection of the occupation would need a complementary acceptance, general or particular, on the part of the occupier (See *Lost Chattels* by *Gardner Smith, University of Missouri Bulletin* (1916), Law Series, No. 10, p. 50, and *Harvard Law Review*, vol. 17, p. 425).

But, independently of the question whether the shipowners or the master on their behalf had a prior possession of the bags of coins as part of the contents of the ship not in the special possession of any person carried upon the ship, the plaintiff, as boatswain, cannot be considered as acquiring a possession for himself. It has been pointed out repeatedly that *Sharman's Case* (1) might have been decided on the ground that the employment of the plaintiff to clean out the defendant's pool involved the consequence that what he found he obtained for the defendant and not for himself (See *Harvard Law Review*, vol. 10, pp. 189 and 445). Indeed, Sir *John Salmond* denied the validity of the ground upon which Lord *Russell* in fact proceeded and justified the decision upon this ground :— "The rings found at the bottom of the pond were not in the company's possession in fact ; and it seems contrary to other cases to hold that they were so in law. But though Sharman was the first to obtain possession of them, he obtained it for his employers and could claim no title for himself" (*Salmond, Jurisprudence*, 8th ed. (1930), p. 307 ; and see Professor *Goodhart, op. cit.* at p. 87).

In *Heddle* v. *Bank of Hamilton* (2), which is made the subject of a full annotation in 6 *British Ruling Cases*, p. 264, the Supreme Court of British Columbia dealt with a case presenting almost the same facts as *M'Dowell* v. *Ulster Bank* (3) and gave effect to the

(1) (1896) 2 Q.B. 44. (2) (1912) 5 D.L.R. 11.
(3) (1899) 33 Ir. L.T. Jo. 223.

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reasons of *Palles* C.B. The court also regarded the article, a wallet mislaid by a customer, as primarily within the bank's possession.

A boatswain looking for stowaways and finding articles in the ship could not, in my opinion, appropriate them to himself, and, if he did so without honestly believing that he had a claim of right, he would be guilty of larceny (See *R.* v. *Pierce* (1)). The appellant made no attempt, so far as appears, to appropriate the money to himself, but conceded the custody as well as the possession to the master. On the ground that he never obtained any possessory title to the coins, I think his action against the collector must fail.

But, even on the contrary assumption, I should be of opinion that a forfeiture was incurred under sec. 229 (*e*) of the *Customs Act* 1901-1935. A number of conditions must be satisfied before a forfeiture under that provision occurs.

The thing to be forfeited must be "goods." I think the coins stowed in bags were "goods." The goods must be found on the ship after arrival. I think "found" does not mean revealed or discovered. The condition was fulfilled by the presence of the goods upon the ship. The goods must not be upon the inward manifest. The manifest did not include them. Baggage of crew or passengers is excepted. The coins were obviously outside the exception.

The final condition is expressed in the words "and not being satisfactorily accounted for." The fulfilment of this condition is more doubtful. The provision is the counterpart of sec. 124 (*b*), which requires a master after clearance to account to the satisfaction of the collector for goods on his outward manifest but not on the ship (See, too, sec. 122). The object is to ensure that goods shall not be clandestinely imported. It applies not only to dutiable goods, but to all goods. Goods on board a ship from overseas are subject to the control of the customs alike with goods unshipped for importation (sec. 31 and sec. 30 (*a*)).

Now at the time of arrival there was no intention on the part of the master or of the plaintiff to land the coins at Melbourne irregularly or, so far as appears, at all. So far as the master was concerned, the explanation of his custody of the coins and of his failure to see that they were on the manifest was necessarily satisfactory. But

(1) (1852) 6 Cox C.C. 117.

it was far otherwise with the true owner. He, it must be inferred, was responsible for the concealment of the coins. As an unavoidable consequence of their secret exportation from New Zealand, it would be necessary to bring them surreptitiously into Australia in contravention of the customs law. For the intention to do this the true owner must also be regarded as responsible. Thus, so far as the true owner was concerned, the presence of the coins on the ship and their absence from the manifest could be accounted for only by an explanation necessarily unsatisfactory. No doubt the question which standpoint must be taken under sec. 229 (*e*) is one of interpretation. But the purpose of the provision appears to me to give the solution of the question. Its object is to deprive the owner of his property in goods which are secretly carried by an incoming ship. The possessory title of the ship or of any member of the ship's company is not the concern of the enactment. Nor do I think it matters that the detection of the attempt to import the goods secretly has been the work of the ship and not of the Customs. It is the attempt itself and not the complicity of the ship or of anybody sailing on it that exposes the goods to forfeiture.

For these reasons I am of opinion that the appeal fails and should be dismissed.

EVATT J. In this action, the plaintiff, pursuant to a notice given under sec. 207 of the *Customs Act*, sued the Collector of Customs for the State of Victoria for the recovery of a bag containing certain pieces of English silver money, which had been seized on behalf of the defendant in his official capacity, purporting to act under sec. 203 of the Act.

The action was tried before *Starke* J., who treated it as the equivalent of a common law action for detention of goods, but in which the defendant was entitled also to rely upon sec. 229 (*e*) of the *Customs Act*, which provides for the forfeiture of certain goods to His Majesty. Without dealing in any way with the issue of condemnation under sec. 229 (*e*) the learned judge nonsuited the plaintiff upon the ground that he failed to prove his possession of, or right to possess, the bag of coins. If the action had been one to which ordinary common law principles were applicable, this course

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would be justifiable. But, at a prior stage of this very litigation, this court has, expressly or by implication, determined not only the issues but also the onus of proof in relation to proceedings taken pursuant to sec. 207 by an "owner" of goods—a word which includes any person (other than a customs officer) who holds himself out as the owner or person having control or power of disposition of the goods (sec. 4). So far as I can gather, the earlier judgments (*Willey* v. *Synan* (1)) decide that, in the present action, though the plaintiff has been compelled to initiate it under sec. 207 in order to avoid an automatic condemnation of the goods, "the collector is the actor"; "in substance he (the plaintiff) is not the attacker, actor, or person seeking redress," and "the action therefore was truly instituted by way of defence to a claim by the Collector of Customs for the condemnation of the appellant's goods" (2).

Solely by the application of the principles thus stated, the court held that the plaintiff, though outside the jurisdiction, was not liable to give security for the costs of the action. Why ? In substance he was a defendant in an action of condemnation. It follows that the issue of condemnation is the only issue, and the onus of establishing it rests upon the present defendant, and not upon the present plaintiff.

But the action was tried in the manner already described, and the plaintiff was regarded as being bound to establish his claim as "owner," and was finally nonsuited. There is an absolute contradiction involved in holding that although the plaintiff is not the actor in the proceedings, still he may be nonsuited in those very proceedings.

The tenor of sec. 207 strongly supports the previous decision of this court to the effect that on the recovery proceedings the issue is not whether the present plaintiff is the "owner" of the goods, but solely whether there has been a "condemnation" of the goods. The proceedings are assimilated to proceedings *in rem*. The collector was not bound to give the plaintiff a written notice requiring him to enter an action for the recovery of the goods, but he chose to do so. He therefore accepted the plaintiff as being entitled to possession for the purposes of sec. 207. The statute provided that, if the

(1) (1935) 54 C.L.R. 175.

(2) (1935) 54 C.L.R., at pp. 185, 186, 187.

plaintiff had not, within the time specified, entered his action, the goods would have been condemned without any further proceedings. As it was, the plaintiff entered an action, and, it would seem that, under sec. 207, only two possible orders can be made by a court having jurisdiction over the matter, viz., (i.) condemnation of the goods, and (ii.) refusal to condemn followed by an order for release of the goods. The learned judge who tried the action has made neither one order nor the other. The result of the order he did make is that the goods are neither condemned nor released. An analogous result is possible under the general law, but such a consequence seems quite opposed to the scheme of sec. 207.

In my opinion, therefore, the previous judgment of the court should have precluded the raising of the issue of ownership, and the onus lay upon the defendant to establish forfeiture. The defendant called no evidence to establish a forfeiture, and although he is entitled to rely upon the evidence of the plaintiff, it is incumbent upon him to prove the forfeiture strictly. The learned trial judge never directed his mind to the question of forfeiture, and this court should not itself pronounce judgment of condemnation, unless it would be impossible for the plaintiff, by calling such further evidence as he may be advised, to avoid such judgment of condemnation. So far as the scanty evidence goes, I think that no case for condemnation has been made out by the defendant.

It was admitted that the plaintiff was a member of the crew of the steamer *Piako*, during its voyage from New Zealand to Australia in August 1933. It is otherwise proved that the plaintiff's position on the vessel was that of boatswain. It was also admitted that, on the arrival of the *Piako* in Melbourne on August 24th, 1933, the bag containing the goods was seized on the vessel by officers of customs.

The defendant justified his seizure for purposes of condemnation of the goods by reference to sec. 229 (*e*) of the *Customs Act*. According to that section, goods are forfeited to the King providing (i.) they are found on any ship after arrival in port; (ii.) they are not specified or referred to in the inward manifest; (iii.) they are not baggage belonging to the crew or passengers; and (iv.) they are not satisfactorily accounted for. In order to establish a forfeiture

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under this sub-section, each of the four matters mentioned above must be established.

Owing to his absence from Australia, the plaintiff was not called as a witness at the hearing of the present action, so that no direct evidence was given by him as to his having come into possession of the goods. But the facts which have been admitted or proved and the inferences which should properly be drawn from the conduct of all the persons concerned in the affair, are sufficient to enable the court to ascertain most of the material facts.

First of all, it is proved that the defendant caused the goods in question to be taken out of the custody of the master of the *Piako* at Melbourne on August 4th, 1933. In an exhibit, M. B. Synan, the Collector of Customs, set out his version of the seizure, adding that the facts of the case were as set out in the report annexed to his own statement. Reference to the accompanying document (par. 3) shows that the landing officer of customs seized the goods upon the instructions of the collector. The same document also shows clearly that the matter of the silver came to the knowledge of the collector solely because the master, upon arrival, immediately reported to the police that the coins " had been found on the vessel during the voyage from Dunedin to Melbourne " (par. 1). It also appears from the defendant's narration of the facts that the New Zealand Government wished to protect its own claim to the goods and that, in order to effect this purpose, " it was decided to seize the silver coins, sec. 229 (*e*) of the Act being relied upon." The collector seemed to consider that, unless the New Zealand Government could establish ownership, the money should be handed over to the agents of the vessel. This opinion in no way concludes the matter, but it indicates what is conclusively established by the other facts and documents—that the seizure was made solely to oblige the New Zealand Government by temporarily retaining the coins in safe custody. Above all, the document establishes that the defendant was not setting up any claim to the goods on behalf of the Crown.

Further, on September 6th, 1933, the Comptroller-General of Customs stated in writing that, as the department had seized the goods and proceeded in accordance with sec. 205 and sec. 207 of the Acts

"the question of disposal should be held in abeyance until expiry of time provided in sections mentioned" (exhibit U). The statement of the Comptroller also shows that, at the time, the defendant was merely holding the silver in custody until the question was determined, not whether the goods should be retained or handed over at all, but only *to whom* the goods were to be handed.

The next matter of importance is that, in addition to claims from the New Zealand Government and the owners of the vessel, a claim to the silver was made by the plaintiff. On September 12th, 1933, the plaintiff through his parliamentary representative asserted in a letter to the Minister that he was responsible for the finding of the silver on the vessel. This claim was made at a time when the plaintiff was aware that both the New Zealand Government and the owners had made a claim to the goods. In a letter of September 20th, 1933, the plaintiff's solicitor also alleged that the plaintiff had found the silver on board the vessel when it was "about half way on its voyage from Dunedin to Melbourne," and, on behalf of his client, he claimed it. Finally, the plaintiff himself, upon the eve of his departure overseas from Fremantle, wrote to the Minister for Customs again, stating that the silver "was found by me on board the above-mentioned ship on the 18th August last, on which ship I held the position of boatswain."

In reply to the plaintiff's solicitor, the Comptroller-General stated: "There are two other claimants to the coins, and the matter is receiving attention." Subsequently, the plaintiff's solicitor again demanded the coins, and, finally, on November 9th, 1933, the Collector of Customs stated that the only other claimants were the owners of the vessel and the New Zealand Government. It is of significance that (i.) neither the master nor any member of the crew *except the plaintiff* claimed to be entitled to the silver or to have had any part in its finding on board the vessel; (ii.) it was never suggested that sec. 229 (*e*) of the Act governed the goods or that the goods had not been accounted for satisfactorily.

Let us analyze the position so far established. The defendant retained the custody of the silver. He seized it for the purpose of retaining the coins in approved custody, lest the claim of the New Zealand Government should be defeated by the coins being landed

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in Australia and finally disposed of, a course which would have involved no breach of any Australian law. But the collector only became aware of the existence of the coins upon the report of the master that they had been found by the plaintiff upon the vessel during its voyage. The volunteering of this report by the master to the police gives rise to the fair inference that the report was honest and believed by the master to be true, for, if he had been implicated in any dishonest way with the transaction, it is hardly credible that he would have reported to the police the possession of the coins.

Here we may conveniently dispose of one matter. Upon the appeal there was much argument as to the admissibility as proof of the facts alleged by the master of a statement made by him to H. R. Weir (a departmental manager for the vessel at Melbourne), the master's statement to the witness being :—

> "A bag of coins was found by the boatswain in the forepeak of the vessel and handed to me. The coins were locked up in the ship's safe by me. They were English silver coins. They were found in a vegetable bag on the voyage from Dunedin to Melbourne."

In my view it is unnecessary to determine this abstract question. A much safer method of approach is to ask, what inference should be drawn from the facts (i.) that the defendant seized the silver from the master upon the report by the master that he had obtained the silver from the boatswain during the voyage, and (ii.) that the seizure was made for the purpose of protecting any claim that the New Zealand Government might have. Only two alternative views are reasonably open : (1) that the master obtained the custody or possession of the goods for the first time during the voyage from some person on the vessel, or (2) that the master had already obtained the custody or possession of the goods *before* the vessel left New Zealand waters, intending to carry them with him to Australia or elsewhere. Upon the latter alternative, a breach of New Zealand law was involved, and it is almost unthinkable that, in such case, the master would have reported his possession of the goods to the Australian Customs immediately upon his arrival at the first Australian port of call. Further, the defendant accepted the master's explanation, and acted throughout upon its correctness. Therefore, the court should infer that the master did obtain custody of the goods for the first time during the voyage to Australia. It

is also a matter of fair inference that it was the plaintiff who handed the goods to the master, and reported that he (the plaintiff) had found the goods upon the vessel. There, again, the fact that the plaintiff gave no direct evidence is quite beside the point. The precise question is—who was the person who handed the coins to the master. No passengers were on board; it was therefore *some* member of the crew. The plaintiff was the only member of the crew who subsequently claimed possession of the silver, and he did so upon the very ground that he was the finder of the silver and had made his finding upon the vessel. He asserted this, and re-asserted it. The master of the vessel always accepted this as the fact. Further, the defendant was in a position to ascertain whether the plaintiff or some other member of the crew was the alleged finder. Yet, throughout the whole controversy, the collector and the other responsible officers of customs all accepted the factual position that the master's statement was true, and that the person who had found or pretended to have found the silver on board was the plaintiff. Moreover, Mr. Weir's evidence is certainly admissible to show that the owners of the vessel, as well as the master, thoroughly accepted the situation that the plaintiff had found the goods on board.

In these circumstances, the inference is that the plaintiff was the finder or the pretended finder, and that the finding or pretended finding took place on the voyage between New Zealand and Australia. As recently illustrated in *Martin* v. *Osborne* (1), the relative probability of any inference or hypothesis varies with the probability of any competing inference or hypothesis. So far as I can ascertain here, there is no competing inference or hypothesis at all, once we reject the theory that the master already had the coins in his possession whilst in New Zealand, and once it is ascertained that the plaintiff, and he alone, continually asserted that he had been the finder, and that all who might be concerned to deny the truth of such assertion thoroughly accepted it.

These being the facts, has the defendant established a forfeiture under sec. 229 (*e*) ? In my opinion he has entirely failed to do so.

I do not think it is necessary to determine whether the silver

(1) (1936) 55 C.L.R. 367.

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can be said to be "found on any ship . . . after arrival in any port," although such a phrase is very strangely applied to a case where (i.) the master of the ship has had the possession or custody of the goods for a considerable time after they were handed to him while the ship was on the high seas, and (ii.) upon arrival in port he immediately reports the goods to the Customs and the fact of their having been handed to him.

In my opinion, sec. 229 (*e*) is excluded because the goods do not answer the description, "not being satisfactorily accounted for." Such expression does not contemplate an investigation of the prior history of the possession or ownership of goods found after arrival in port, for the purpose of excluding the possibility of all elements of unlawfulness. In the present case, the master's account of how he came by the goods was volunteered to the customs. So far as he was concerned, the goods were discovered during the voyage and handed over to him to be kept in a safe place, and he so kept them and produced them immediately after arrival. For reasons already given, it is not possible to find that his account was not true in every particular. There is no evidence that the goods were intended to be smuggled into Australia. The master's account also explained the omission of any reference to the goods in the manifest. If it is a matter for this court to determine whether the goods were "satisfactorily accounted for," the answer should be that they were accounted for, and satisfactorily. Even if it were a matter for the Customs Department to determine (a view I do not accept) there is no question that, in the present case, the Customs Department accepted the master's account as true and satisfactory. They not only accepted his account, but, on the basis of such acceptance they detained the goods, not because they believed that there had been a forfeiture under sec. 229 (*e*), but merely to afford some basis for "holding" the goods to protect any claim the New Zealand Government might care to press.

As I understand it, the defendant's contention is that, although the master's account would be deemed "satisfactory" in legal proceedings brought under sec. 207 by the master or owner of the vessel, it ceases to be "satisfactory" because the plaintiff gives no account other than reasonable proof of the fact that he handed the

goods to the master *en voyage*. This distinction I cannot fathom. Proceedings under sec. 207 are *in rem*. The question whether judgment of forfeiture should be given cannot depend upon the question whether it is A or B or C to whom notice has been given under sec. 207. Given perfect honesty on the part both of the plaintiff and the master, what further "account" could they give except the one given here? It is said also that the account given merely amounts to saying:—"Here are the goods! The goods are here!"; so that there is no "satisfactory" account. But this is not so. The goods when found on board were outside Australia; when found after arrival, they were inside Australia. The theory of the defendant is, apparently, that goods honestly discovered during the voyage by the master or a sailor are necessarily forfeited to the Customs in Australia if an Australian port happens to be the next port of call, because *ex hypothesi* the finder cannot state the whole truth, and that is required for the purposes of the Australian Customs. I venture to think that this is not the scope and purpose of sec. 229 (*e*). By parity of reasoning, the true owner of goods, if resident in New Zealand, could not avoid the forfeiture although he proved that the goods had been stolen from him by some person unknown and they were now in the possession of the Australian Customs. For the Australian Customs would say: "You have failed to tell me who the thieves are and how they got them on board the vessel which has now called at this Australian port." In my opinion, the theory behind these arguments for the defendant is unsound, and every *true* account by a master of a vessel of his having found the goods on board whilst his vessel was on the high seas must be accepted as a satisfactory account within the meaning of sec. 229 (*e*). This does not mean that the master or any other person becomes invested with any right to the goods, but means only this, that the reason for the omission of the goods from the manifest and the list of baggage is at once clear, so that a competition for the right of possession of such goods must be determined according to the ordinary law. It must be remembered that, except for the purpose of preventing, taxing or regulating importation, the Customs have, generally speaking, nothing to do with the investigation of questions of ownership and possession of

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goods. The States of Australia and their courts are concerned with the administration of criminal law and police offences and can properly investigate questions of disputed possession, including the possession of goods suspected of having been stolen (Cf. *Lyons* v. *Smart* (1)).

In my opinion the appeal should be allowed.

McTIERNAN J. The appellant sued the respondent, who is the Collector of Customs for Victoria, for the recovery of a bag of coins which were seized by his officers as goods that were forfeited to His Majesty by virtue of sec. 229 (*e*) of the *Customs Act* 1901-1935. At the time of the seizure the coins were in the possession of the master of the s.s. *Piako* which had arrived in Melbourne from Dunedin, New Zealand.

The appellant had asserted the right, given by sec. 205 of the *Customs Act* 1901-1935 to the owner of goods which are seized as forfeited, to give notice to the Collector of Customs that he claimed the bag and its contents. Sec. 4 of the Act defines "owner" to include any person being or holding himself out to be the owner or person possessed of the goods. Upon receipt of the appellant's claim the respondent gave notice under sec. 207 of the *Customs Act* 1901-1935 requiring him to enter an action for the recovery of the goods.

The appellant, who was the boatswain on the *Piako*, founded his right to recover the coins upon proof of the allegation which is expressed in the statement of claim in these terms: "On the twenty-first day of August 1933 whilst the said steamship was in mid-ocean bound from Dunedin, New Zealand, to Melbourne in the State of Victoria, the plaintiff found on board or was possessed of or the owner of English silver coins totalling in value three hundred and fifty-one pounds five shillings (£351 5s.)."

At the trial the appellant was nonsuited on the ground that there was no evidence that he did in fact find the coins. The appellant, who is resident beyond the jurisdiction of the court, was absent from Australia at the time of the trial. The only oral evidence given in the case was that of Weir, the manager for the Melbourne

(1) (1908) 6 C.L.R. 143, at p. 154.

agents of the shipowners. He testified that on the arrival of the ship in Melbourne he went on board and saw the master of the ship who said to him : " A bag of coins was found by the boatswain in the forepeak of the vessel." The documentary evidence consisted of the ship's certificate of clearance, its inward and outward manifest and a list of articles in the possession of the crew. These documents make it clear that the coins were not part of the cargo or the baggage of the crew. Certain reports by officers of customs stated that the coins had been reported to have been found on the ship and that on its arrival in Melbourne they were taken from the custody of the master. There was also correspondence showing that claims to the coins had been lodged by the owners of the *Piako* and the New Zealand Government as well as by the appellant. It was admitted that no action pursuant to notices served on them by the respondent under sec. 207 of the *Customs Act* 1901-1935 had been entered by these claimants.

The master's statement to Weir is clearly hearsay as to the fact that the appellant found the coins, and the attempt to justify its admission as a declaration against interest binding on the respondent must fail, as the respondent's right to the possession of the coins is not derived from the master of the ship or the shipowners, but depends on the exercise of a paramount authority given to him by sec. 229 (*e*) of the *Customs Act* 1901-1935.

It was contended, however, that the inference which should be drawn from the rest of the evidence, bearing in mind that the appellant is the only member of the crew to have claimed to be the finder, is that his claim is true. The assumption upon which this inference would rest is that if any person other than the appellant had been the actual finder of the bag of coins, he would have made a claim or at least denied that of the appellant. This assumption, though obviously not a certain one, is yet reasonable, and I am content to deal with the case on the basis that the appellant did find the coins.

The real issue then to be determined is whether the bag of coins should be deemed to be condemned. No question arises as to the respective rights of the appellant and the owners of the vessel to the possession of the coins. The owners have abandoned their claim. It may be that even if the coins are not liable to forfeiture

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the appellant obtained no right by finding which would enable him to succeed in an action against the respondent for detinue or conversion, but I find it unnecessary to determine that question. If the subject coins fall within the terms of sec. 229 (*e*) they stand forfeit and thereby the right of the finder to possession no less than the title of their true owner is extinguished.

Sec. 229 (*e*) provides that all goods found on any ship after arrival in any port and not being specified or referred to in the inward manifest and not being baggage belonging to the crew or passengers and not being satisfactorily accounted for shall be forfeited to His Majesty.

" Goods " are defined to include all kinds of movable personal property. The bag of coins falls within this definition.

The coins were taken by the customs officers from the custody of the master. It had already been reported to them that the coins were on the ship. So that the coins were not found in the sense that they were discovered. But " found " in this context is certainly not limited to mean " discovered." Its true significance is " found to be present."

As the coins were not specified or referred to in the inward manifest, and were not part of baggage belonging to the crew (there were no passengers), the final condition precedent to their forfeiture is satisfied if they were not " satisfactorily accounted for." In my opinion, what needs to be satisfactorily accounted for is the presence of goods on a ship when they are not part of the baggage and not specified or referred to in the inward manifest. The section aims at the forfeiture of goods which are being carried clandestinely whether they are subject to duty or not. Clearly the only persons who could give any account are the owner of the goods or the person responsible for putting them on board or the person who might be found endeavouring to remove them from the ship in port. To say of the coins " They were found on board " merely states the position of which an account is required and explains nothing but their presence in the hands of whoever may be in accidental possession of them. Such a person cannot give a satisfactory account of why the goods come to be on the ship.

For these reasons I am of opinion that the coins are liable to be forfeited under sec. 229 (*e*). It follows that the appellant's claim fails.

The appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Abram Landa & Co.*

Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for t the Commonwealth.

H. D. W.

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[HIGH COURT OF AUSTRALIA.]

ANDERSON . . . . . APPELLANT;

AND

THE COMMISSIONER OF TAXES (VICTORIA) RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Probate Duty (Vict.)—Purchase of real and personal property—Money contributed by both purchasers—Death of one joint owner—Interest of deceased joint owner not subject to duty—"Voluntarily"—Administration and Probate Act 1928 (*Vict.*) (*No.* 3632), *sec.* 174.

Sec. 174 of the *Administration and Probate Act* 1928 (Vict.) provides: "All property of any kind whatsoever which a person having been absolutely entitled thereto has voluntarily caused or may cause to be transferred to or vested in himself and any other person jointly whether by disposition or otherwise (including any purchase or investment effected by the person who was absolutely entitled to the property) either by himself alone or in concert or by arrangement with any other person so that a beneficial interest therein or in some part thereof passes or accrues by survivorship on his death to such other