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He Kaw Teh v R 157 CLR 523

Appl
Turner v Owen 96 ALR 119

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R v McLennan; Ex parte Carr (1952) 86 CLR 46

[HIGH COURT OF AUSTRALIA.]

POOLE . . . . . APPELLANT.
INFORMANT,

AND

WAH MIN CHAN . . . . . RESPONDENT.
DEFENDANT,

H. C. OF A. 1947.

SYDNEY, *Aug.* 20.

MELBOURNE, *Oct.* 14.

Latham C.J., Rich, Starke, Dixon, McTiernan and Williams JJ.

Customs—Prohibited imports—Possession—Offence—Knowledge—Whether ingredient of offence—Absence of reasonable excuse—Onus probandi—Regulations—Importation of goods—Prohibition by statute of specified goods—Prohibition by regulations of "any goods" unless under licence therefor—Validity—Customs Act 1901-1936 (*No.* 6 *of* 1901—*No.* 85 *of* 1936), *ss.* 52 (*g*), 56, 233, 233B, 270—*Customs* (*Import Licensing*) *Regulations* (*S.R.* 1939 *No.* 163), *regs.* 3, 5—*Customs* (*Prohibited Imports*) *Regulations* (*S.R.* 1934 *No.* 152—1946 *No.* 169).

The *Customs Act* 1901-1936 provides by s. 52: "The following are prohibited imports". Then follows a list under heads (*a*) to (*i*) of widely differing articles which includes: "(*g*) All goods the importation of which may be prohibited by regulation." The *Customs* (*Import Licensing*) *Regulations* provide by reg. 3 that "the importation of any goods shall be prohibited unless—(*a*) a licence to import the goods is in force. . . ."

Held, by *Latham* C.J., *McTiernan* and *Williams* JJ. (*Rich*, *Starke* and *Dixon* JJ., *contra*) that the regulation was valid in that s. 52 (*g*) means that regulations may prohibit the importation of specified goods or of all goods.

Lyons v. *Smart* (1908) 6 C.L.R. 143 and *Hill* v. *Donohoe* (1911) 13 C.L.R. 224, distinguished.

Radio Corporation Pty. Ltd. v. *The Commonwealth* (1938) 59 C.L.R. 170, applied.

The defendant was charged under s. 233 (1) (*d*) of the *Customs Act* 1901-1936 that he unlawfully had in his possession prohibited imports, to wit, 634 diamonds. A licence for the importation of the diamonds had not been granted under reg. 3 of the *Customs* (*Import Licensing*) *Regulations* 1939. The information was dismissed on the ground that the informant did not prove that the defendant had knowledge that the diamonds found in his possession were prohibited imports. The informant appealed to the High Court.

Held, by *Latham* C.J., *Starke*, *McTiernan* and *Williams* JJ. that possession without reasonable excuse of prohibited imports is in itself an offence under s. 233 (1) (*d*) of the *Customs Act* 1901-1936.

The Court being equally divided on the validity of the regulation on which the prosecution was based, the decision of the Court was in accordance with the opinion of the Chief Justice.

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CASE STATED.

Upon an information laid under s. 233 of the *Customs Act* 1901-1936, by John Burfitt Poole, an officer of Customs stationed at Sydney, Wah Min Chan, of 115 Storey Street, Maroubra, New South Wales, was charged that at Sydney, in the said State, on or about 16th April 1947, he did contrary to the *Customs Act* 1901-1936, unlawfully have in his possession prohibited imports, to wit, six hundred and thirty-four (634) diamonds whereby Wah Min Chan, the defendant, had incurred a penalty in excess of the sum of £500, but such excess was abandoned. The informant averred, *inter alia*, that the said diamonds were brought to Australia from parts beyond the seas subsequent to 1st March 1940, and that a licence under reg. 3 of the *Customs* (*Import Licensing*) *Regulations* had not been granted for the importation of the diamonds.

Section 52 of the *Customs Act* 1901-1936 provides that "the following are prohibited imports" and then follows a list under heads (*a*) to (*i*) of the most heterogenous character. One of these headings is: "(*q*) All goods the importation of which may be prohibited by regulation." So far as material, s. 233 of the Act provides:—"(1) No person shall . . . (*d*) unlawfully convey or have in his possession any smuggled goods or prohibited imports or prohibited exports . . . (2) It shall not be lawful for any person to convey or have in his possession without reasonable excuse (proof whereof shall lie upon him) any smuggled goods or prohibited imports. (3) It shall not be lawful for any person to convey or have in his possession any prohibited exports with intent to export them or knowing that they are intended to be unlawfully exported."

Regulation 3 of the *Customs* (*Import Licensing*) *Regulations* (Statutory Rules 1939 No. 163) provides that "the importation of any goods shall be prohibited unless—(*a*) a licence to import the goods is in force and the terms and conditions (if any) to which the licence is subject are complied with; or (*b*) the goods are excepted from the application of these Regulations."

The defendant pleaded not guilty.

The following facts were found by the magistrate to be established to his satisfaction by the evidence given before him:—(*a*) that the

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defendant on 16th April 1947 at Sydney, New South Wales, had in his possession six hundred and thirty-four diamonds; (*b*) that the said diamonds were prohibited imports (a submission by counsel for the defendant that the said diamonds were not prohibited imports in that the *Customs* (*Import Licensing*) *Regulations* by which their importation was prohibited were invalid was left undecided); (*c*) that the defendant gave an untrue account as to how he came to be possessed of the said diamonds; (*d*) that a licence to import the said diamonds had not been issued to the defendant; and (*e*) that the defendant had the said diamonds in his possession unlawfully.

After hearing the informant and his witnesses the magistrate dismissed the information on the following grounds:—(i) that submission by counsel for the defendant, citing in support thereof the cases of *Hill* v. *Donohoe* (1) and *Lyons* v. *Smart* (2) that it is an element in the offence charged that the defendant should know that the diamonds found in his possession were prohibited imports was upheld by him; and (ii) that whilst from the untrue account and evasive answers given by the defendant when questioned as to his possession it could be implied that his possession of the said diamonds was unlawful, there was, in the magistrate's opinion, no evidence by which a knowledge could be imputed to the defendant as to the specific character of the said goods, that is to say, that they were prohibited imports.

Upon the informant contending that the magistrate was in error in holding that the prosecution must prove, as an element of the offence constituted by s. 233 (1) (*d*) of the *Customs Act* 1901-1936 and charged against the defendant, that the defendant had knowledge that the goods found in his possession were prohibited imports, a case was stated for the opinion of the High Court. The question for the determination of the Court was whether the magistrate's determination dismissing the information was erroneous in point of law.

Further relevant statutory provisions appear in the judgments hereunder.

Taylor K.C. (with him *Allen*), for the appellant. The *Customs Act* 1901 was materially amended by the *Customs Act* 1910 by the insertion in s. 233 (1) (*d*) of the words "prohibited imports" and the inclusion of sub-s. (2) which defines "unlawful," therefore the decision in *Lyons* v. *Smart* (2) is no longer applicable. In that case there was no evidence to show that the defendant knew that the goods in question were prohibited imports. The case was

(1) (1911) 13 C.L.R. 224. (2) (1908) 6 C.L.R. 143.

authority for the sole proposition that no offence had been committed. The Court in that case, and also in *Hill* v. *Donohoe* (1) was only concerned with the quality of the offence, that is, whether or not it was an offence under the *Customs Act*, and was not at all concerned with the onus of proof. The finding of the magistrate of the fact that the possession was unlawful is sufficient to dispose of the case. It is a finding that the respondent had the subject goods unlawfully in his possession. The offence is established, irrespective of proof of knowledge, when the ingredients set out in par. (*d*) of s. 233 (1) are established, and it is then incumbent upon the defendant, if he desires to exculpate himself, to establish a reasonable excuse under sub-s. (2) of s. 233. Once it is conceded that lack of knowledge that the goods are prohibited imports is a reasonable excuse, then it must follow that proof of knowledge is not necessary to establish the offence in the first instance (*Maher* v. *Musson* (2)). It is not necessary for the informant to prove lack of knowledge on the part of the defendant; the onus of proving such lack of knowledge is upon the defendant (*Francis* v. *Rowan* (3); *Proudman* v. *Dayman* (4); *McLeod* v. *Buchanan* (5)). Section 233 (1) (*d*), read particularly in the light of sub-s. (2) of s. 233, clearly establishes that the offence is prima facie proved against the defendant by proof of the matters specified.

Barwick K.C. (with him *Smyth*), for the respondent. The findings by the magistrate are, in effect, that in his opinion the possession by the defendant was not honest, but that there was not sufficient evidence to enable him, the magistrate, to conclude that the defendant had any knowledge of the precise character of the goods in the relevant sense, namely, that they were prohibited imports. It is quite clear that the magistrate did not mean to find that they were unlawfully in the defendant's possession within the meaning of par. (*d*) of s. 233 (1). It was held in *Lyons* v. *Smart* (6) that the word "unlawfully" in s. 233 included "knowingly," but that it was not merely "knowing" and the Court came to the conclusion that the portion of the statute that the possession had to contravene was the part relating to importation. The insertion in s. 233 of sub-s. (2) by the 1910 Act was directed only to that part of *Lyons* v. *Smart* (6) involving the word "unlawfully" and which dealt with the endeavour to find what was in contravention of the Act.

(1) (1911) 13 C.L.R. 224.
(2) (1934) 52 C.L.R. 100, at pp. 103-105, 109.
(3) (1941) 64 C.L.R. 196, at pp. 202, 204.
(4) (1941) 67 C.L.R. 536, at pp. 538-540, 543.
(5) (1940) 2 All E.R. 179, at p. 186.
(6) (1908) 6 C.L.R. 143.

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The Parliament intended *scienter* to be part and parcel of the offence. Sub-section (2) of s. 233 creates a substantive and separate offence. This view is assisted by sub-s. (3). Section 233 (1) (*d*) is not impinged ; the draftsman has provided a new offence. He got rid of the word " unlawfully " and he got rid of the need for *scienter* as part of the Crown case, but he has left the escape for the defendant in the words " without reasonable excuse." The onus is upon the prosecution of proving that the defendant was in fact in possession of goods which goods were in fact prohibited imports, or in law prohibited imports, and that he knew that they were prohibited imports. *Lyons* v. *Smart* (1) decided that s. 233 meant that the defendant had to have the goods in his possession knowing them to be prohibited imports and that he must have participated in their importation in substance. The section as amended provides for the retention of all the words and that it was not necessary that the defendant should have been a participant in the importation of the prohibited goods. The amendment deals only with one of the two elements in *Lyons* v. *Smart* (1). Section 233B, inserted by the 1910 Act, is notable for the absence of the word " unlawfully " and for the fact that it provides for a precise set of circumstances that would be covered by s. 233 (1) (*d*) if the word " unlawfully " does not involve *scienter*. There is some difference between s. 233 (1) (*d*) and s. 233B. Alternatively, on the footing that sub-s. (2) of s. 233 provides a full dictionary for the word " unlawfully " in s. 233 (1) (*d*), there is no difference. *Hill* v. *Donohoe* (2) is a precise and distinct decision that *scienter* is a necessary ingredient of this offence, that guilty knowledge is an essential ingredient of this offence. Reasonable excuse is not directed to the mental element. *Maher* v. *Musson* (3) was decided, in one sense, on the narrow ground that the Court was justified in construing the statute there under consideration as involving *mens rea*. The statute was held to be a revenue statute *in stricto sensu* and because of that one could be warranted in not requiring *mens rea*. The expression in sub-s. (2) of s. 233 " without reasonable excuse " must mean " without reasonable excuse in relation to the *Customs Act*," that is to say, there must be some Customs' excuse for the possession. There is nothing in the Act which makes want of knowledge a reasonable Customs' excuse. The policy of the legislature is to make it an offence for anyone to have prohibited imports in his possession unless there is some reasonable excuse connected with the *Customs Act* for his having them. It is not directed to the question of knowledge

(1) (1908) 6 C.L.R. 143.
(2) (1911) 13 C.L.R. 224.
(3) (1934) 52 C.L.R. 100.

at all. What is dealt with under "reasonable excuse" is some Customs' excuse which would exclude his possession under the Customs law. *Lyons* v. *Smart* (1) was regarded in *Attorney-General for New South Wales* v. *Brewery Employés Union of New South Wales* (2) as an authority for the proposition that without *scienter* the offence would have been ultra vires. The construction of s. 233 should not be approached without the aid of the intervening decisions and amendments. An analysis of *Lyons* v. *Smart* (1) shows that "knowingly" was there held to be part of "unlawfully." The cases where *mens rea* is said not to be an essential ingredient of the offence are summarized in *R.* v. *Turnbull* (3). The fact that s. 233B was inserted in the Act at the same time as s. 233 (1) was amended, and that there was no repetition of the word "unlawfully" in s. 233B, is an additional aid to the view that there is some significance left in the word "unlawfully" beyond mere contravention of the Act. This is particularly so having regard to the fact that s. 233 (1) (*c*) may cover some part of the same ground. If the words "without reasonable excuse" mean, as it is submitted they do, that knowledge is a necessary ingredient of the offence under s. 233B, then "without reasonable excuse" cannot be directed to knowledge. There is no room for that view of s. 233B. The *Customs* (*Import Licensing*) *Regulations* are ultra vires. Those regulations, which were promulgated after the decision in *Radio Corporation Pty. Ltd.* v. *The Commonwealth* (4) do not specify a list of prohibited goods but are in general terms. The regulations are repugnant to the *Customs Act* because they cover in part, and severally cover, classifications covered by the statute. Regulation 3 of those regulations covers all the goods specifically referred to in s. 52 of the Act and subjects them to licence. In effect it provides that goods prohibited by s. 52 may be imported subject to a licence therefor being granted under the regulations. This effect is not cured by reg. 5 of the regulations. The whole of the law which operates in the case of prohibited imports is to be found in the *Customs Act*. The reference to "any other law" in reg. 5 must refer to something outside s. 52, because s. 52 is the law on the subject (*Baxter* v. *Ah Way* (5)). The regulations are not in themselves the law, they are simply part of s. 52. The effect of the regulations is to supersede all the classifications in s. 52 and supplant them with a statement, "any goods except under licence." The regulations make goods which are absolutely prohibited in s. 52 impor-

(1) (1908) 6 C.L.R. 143.
(2) (1908) 6 C.L.R. 469, at p. 518.
(3) (1943) 44 S.R. (N.S.W.) 108; 61 W.N. 70.
(4) (1938) 59 C.L.R. 170.
(5) (1909) 8 C.L.R. 626, at pp. 636-640.

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table subject to licence, a result which is not avoided by reg. 5. It follows that the regulations are ultra vires (*Bentham* v. *Hoyle* (1)). The power given under s. 52 (*g*) to make regulations is merely a power to nominate classes of goods. To provide that all goods are prohibited imports is to do something which s. 52 does not contemplate, because it is a section in which there is a special segregation of prohibited imports in a fairly limited range of goods all of which, on the face of them, have some public reason associated with their prohibition. There is an intention that the Governor-General in Council should consider and direct his attention to a specific class or classes of goods. The regulations, however, adopt a general policy that no goods ought to come into this country unless the Executive permits the importation of those goods. That is entirely outside the basis of s. 52. The regulations change the whole policy of the *Customs Act* as clearly evidenced throughout its provisions. The decision in *Radio Corporation Pty. Ltd.* v. *The Commonwealth* (2) does not mean that the Minister may reserve to himself some individual remission of the prohibition. All he can do is to make the conditions of the prohibition itself a general uniform rule.

Taylor K.C., in reply. Although the *Customs Act* was amended by the 1910 Act, s. 233 was not amended. It is a completely new section and the word " unlawfully " contained in the new section must be understood at least in the light of sub-s. (2) which was enacted at the same time. Sub-sections (2) and (3) were intended to deal with the word " unlawfully " in relation to the prohibited imports and exports so far as they are covered by s. 233 (1) (*d*). The question of onus of proof was not discussed in *Hill* v. *Donohoe* (3) and it is submitted that the Chief Justice at no time intended to deal with it. His Honour did not adopt *Lyons* v. *Smart* (4) as a real basis so far as onus of proof was concerned but made reference to the nature of the offence. Although the question of knowledge was dealt with in *R.* v. *Turnbull* (5) that was an entirely different case. Section 233 does not make an offence of innocent possession. Section 233B is directed to preventing the unlawful possession of prohibited imports. Referring more particularly to s. 233 (1) (*d*), prohibited imports are well within the sphere of Customs legislation and possession of such imports without lawful excuse is well within the ambit of such legislation. The various sub-sections of s. 52

(1) (1878) 3 Q.B.D. 289, at pp. 293, 294.
(2) (1938) 59 C.L.R. 170.
(3) (1911) 13 C.L.R. 224.
(4) (1908) 6 C.L.R. 143.
(5) (1943) 44 S.R. (N.S.W.) 108; 61 W.N. 70.

do not furnish mutually exclusive groups of goods. The provision as to " all goods " in sub-s. (*g*) of s. 52 is a power which is sufficiently wide to prohibit absolutely the importation of all goods and certainly includes a power to prohibit subject to a " condition or restriction " (s. 56), the importation of any goods. It has been said that the limit of the discretion conferred by s. 52 (*g*) possibly was a discretion to examine particular classes of goods and to decide whether their importation should be prohibited. Instead of, perhaps, in a particular case the Executive directing its attention to a particular limited class of goods the importation of which should be totally prohibited, it might think it necessary that all goods, unless they complied with some specified condition or restriction should be prohibited imports. *Radio Corporation Pty. Ltd.* v. *The Commonwealth* (1) decides that the requirement that the Minister's consent shall be obtained is a permissible condition or restriction under s. 52 (*g*) and s. 56; then under s. 52 (*g*) the importation of all goods may be prohibited subject to that particular specified condition or restriction. There is nothing in s. 52 (*g*) to warrant the view that the word " all " in the phrase " all goods " means " such specified class." This Court has held that " all goods " in circumstances analogous to the circumstances in this case mean " all " goods (*Victorian Chamber of Manufactures* v. *The Commonwealth* (*Prices Regulations*) (2)). The expression " any other law " in reg. 5 of the *Customs* (*Import Licensing*) *Regulations* means " any law other than these regulations."

Cur. adv. vult.

Oct. 14.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal by way of case stated from a decision of a stipendiary magistrate dismissing a charge against Wah Min Chan that he did, contrary to the *Customs Act* 1901-1936, unlawfully have in his possession prohibited imports, to wit, 634 diamonds. It was proved that the defendant had 634 diamonds in his possession. It was also proved that no licence to import the diamonds had been issued to the defendant. The *Customs* (*Import Licensing*) *Regulations*, (Statutory Rules 1939 No. 163) provide (reg. 3) that :—" The importation of any goods shall be prohibited unless—(*a*) a licence to import the goods is in force and the terms and conditions (if any) to which the licence is subject are complied with ; or (*b*) the goods are excepted from the application of these Regulations." It was also established to the satisfaction of the

(1) (1938) 59 C.L.R. 170.

(2) (1943) 67 C.L.R. 335, at pp. 340, 342, 344, 345.

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magistrate that the defendant gave an untrue account as to how he came to be possessed of the diamonds. The magistrate dismissed the information on the ground that the cases of *Hill* v. *Donohoe* (1) and *Lyons* v. *Smart* (2) showed that it was a necessary element in the offence charged that the defendant should know that the diamonds found in his possession were prohibited imports. The magistrate adds, in his statement of the grounds upon which he dismissed the information :—" That whilst from the untrue account and evasive answers given by the defendant when questioned as to his possession it could be implied that his possession of the said diamonds was unlawful, there was, in my opinion, no evidence by which a knowledge could be imputed to the defendant as to the specific character of the said goods that is that they were prohibited imports." The charge was laid under the *Customs Act* 1901-1936, s. 233, which provides as follows :—" (1) No person shall—(*a*) smuggle any goods ; or (*b*) import any prohibited imports ; or (*c*) export any prohibited exports ; or (*d*) unlawfully convey or have in his possession any smuggled goods or prohibited imports or prohibited exports. Penalty : One hundred pounds. (2) It shall not be lawful for any person to convey or have in his possession without reasonable excuse (proof whereof shall lie upon him) any smuggled goods or prohibited imports. (3) It shall not be lawful for any person to convey or have in his possession any prohibited exports with intent to export them or knowing that they are intended to be unlawfully exported."

When *Lyons* v. *Smart* (2) was decided in 1908 s. 233 was in a very different form. Section 233 of the *Customs Act* 1901 then provided as follows :—" No person shall smuggle or unlawfully import, export, convey or have in his possession any goods. . . ." The Court held that the word " unlawfully " attached to each of the acts described in this provision. A provision, however, that no person should unlawfully have in his possession any goods, if construed according to the simple and natural meaning of the words, could not be supported as legislation with respect to customs. The Court interpreted the section as not purporting to impose a penalty on a person who is in possession of goods which had been unlawfully imported if that person was in no way connected with their importation, although he knew that they had been so imported. Section 233 of the 1901 Act, however, was repealed by Act No. 36 of 1910 and the section as it now appears (amended by Act No. 12 of 1923) is in a very different form. The difficulties with which the Court dealt in *Lyons* v. *Smart* (2) do not arise in connection with the

(1) (1911) 13 C.L.R. 224.

(2) (1908) 6 C.L.R. 143.

present section, and it is the duty of the Court to construe the present section as it stands. In my opinion the decision in *Lyons* v. *Smart* (1) does not give any assistance in the interpretation of the present section.

Hill v. *Donohoe* (2) was a decision upon s. 233B (1), which provides that any person who—" (*c*) without reasonable excuse (proof whereof shall lie upon him) has in his possession any prohibited imports to which this section applies which have been imported into Australia in contravention of this Act " shall be guilty of an offence against the Act. In *Hill* v. *Donohoe* (2) it was held that it was an element of the offence constituted by this section that the defendant should know that the prohibited imports found in his possession had been imported into Australia in contravention of the Act. Section 233B (1) (*c*) is a very different provision from s. 233 (1) (*d*) read in conjunction with sub-ss. (2) and (3) of that section, and *Hill* v. *Donohoe* (2) construing s. 233B (1) (*c*), cannot, in my opinion be regarded as an authority upon the construction of s. 233 (1) (*d*).

The section as it now stands provides that a person is guilty of an offence if he unlawfully has in his possession any (1) smuggled goods, or (2) prohibited imports, or (3) prohibited exports. Under such a provision a question at once arises as to the meaning of the word " unlawful." In sub-s. (2) the legislature has expressly provided that certain facts shall constitute unlawful possession of smuggled goods or prohibited imports. Sub-section (2) provides that the possession by a person of goods shall be unlawful if (1) they are prohibited imports, and (2) he is in such possession without reasonable excuse, proof of such excuse to lie upon him. If these conditions are satisfied the possession is declared by the statute to be unlawful and it is unnecessary to consider whether or not the person charged knew that the goods were prohibited imports. A defendant may be able to show that he had no reason to believe that the goods were prohibited imports. Generally, such proof would provide a reasonable excuse. The opinion that possession without reasonable excuse of prohibited imports in itself and independently of any further mental element consisting in knowledge that the goods are prohibited imports is an offence is supported by a consideration of sub-s. (3). Sub-section (3) relates to prohibited exports and contains a provision which is applicable in interpreting the word " unlawful " in s. 233 (1) (*d*) in connection with prohibited exports. Sub-section (3) provides that it shall not be lawful for any person to convey or have in his possession any prohibited exports " with intent to export them or knowing that they are

(1) (1908) 6 C.L.R. 143.

(2) (1911) 13 C.L.R. 224.

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intended to be unlawfully exported." In this case the legislature has defined a mental element the presence of which is necessary in order to make possession unlawful under the provisions of sub-s. (3). There is no corresponding provision in sub-s. (2) relating to any mental element in the offence except in so far as a mental element is introduced by the words " without reasonable excuse "—words which would entitle the defendant to explain his possession of the goods by reference to his knowledge or intent. The onus of proving the existence of a reasonable excuse is expressly imposed upon the defendant.

It is not necessary to interpret sub-ss. (2) and (3) as containing an exhaustive definition of unlawfulness for the purpose of s. 233 (1) (*d*). They do, however, expressly provide that certain possession shall be unlawful, and in the present case the conditions specified in sub-s. (2) are satisfied in that the defendant had the diamonds in his possession, and he had no reasonable excuse for having them in his possession. If they were prohibited imports he should have been convicted.

The next question is whether the diamonds were prohibited imports. It is contended that the *Customs (Import Licensing) Regulations*, the principal provision of which has been quoted, are invalid. They were made under the power conferred by ss. 52 and 270 of the *Customs Act*. Section 270 confers a general power to make regulations prescribing matters which by the Act are permitted to be prescribed &c. Section 52 provides that : " The following are prohibited imports." Then follows a list under heads (*a*) to (*i*) of the most heterogenous character. One of these headings is " (*g*) All goods the importation of which may be prohibited by regulation." It is contended for the defendant that some limitation should be placed on the generality of these words. On the other hand, it is contended for the prosecutor that the words simply mean that the list of prohibited imports may be added to by regulation, and that regulations may add small classes or large classes or may go so far as to prohibit the importation of any goods at all.

I have said that the categories of goods mentioned in s. 52 constitute a heterogenous list. The list includes (*a*) copies of works which, if made in Australia, would infringe copyright, provided that a certain notice is given ; (*b*) false money of various kinds ; (*c*) blasphemous, indecent or obscene works or articles ; (*d*) goods manufactured by prison labour ; (*e*) exhausted and adulterated tea ; (*f*) oleomargarine or substitutes for butter unless coloured and branded as prescribed ; (*h*) all goods having thereon or therewith any false suggestion of government guarantees ; and (*i*) mineral

oil and mineral spirits unless imported under and subject to such restrictions as may be declared by proclamation. Thus the goods which are specified are described by reference to what may be called physical or moral or economic or hygienic qualities except in the case of mineral oil &c. They possess no common characteristic except that for one or other of greatly varying reasons Parliament was of opinion that their importation should be prohibited. It has been held in *Radio Corporation Pty. Ltd.* v. *The Commonwealth* (1) that the *ejusdem generis* rule cannot be applied to the provision authorizing the prohibiting by regulations of "all goods the importation of which may be prohibited by regulation." It was further held in the same case that the requirement of the consent of the Minister to the importation of goods was a condition or restriction which could validly be imposed under s. 56 of the Act, which provides that the power of prohibiting importation of goods (which is plainly a reference to s. 52 (*g*)) shall authorize prohibition, subject to any specified condition or restriction, and that goods imported contrary to any such condition shall be prohibited or restricted imports.

It has been argued that regulations made in pursuance of the power conferred by s. 52 (*g*) can be valid only if they deal on each occasion with some particular class of goods by reference to some distinctive quality of the goods. In my opinion no argument of any definiteness and precision has been adduced to support this contention. I agree that the power to add by regulation to the list of prohibited imports has been used so as to produce a complete change in the effect of customs legislation. The *Customs Act*, dealing with the importation of goods, provides for importation of goods subject to the operation of a limited list of prohibitions. Additions to that list may be made by regulations. The effect of the *Import Licensing Regulations* is to substitute for this system a general prohibition of imports subject to allowances of importation by licences. There are many obvious objections to a system which so clearly involves the risk of arbitrary control and discrimination in respect of which a member of the public has no effective remedy. But whether economic or other circumstances justify the establishment of such a system notwithstanding such objections is a matter for Parliament, and not for the court. In my opinion the provision that prohibited imports include all goods the importation of which may be prohibited by regulations means that regulations may prohibit the importation of any specified goods or of all goods.

(1) (1938) 59 C.L.R. 170.

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A similar question arose with respect to the power conferred upon the Minister by the *National Security* (*Prices*) *Regulations*, reg. 22, to declare " any goods to be declared goods " for the purposes of the regulations. It was argued that the Minister under this provision had power only to declare goods class by class and that he had no power to make what might be called an over-all declaration of all goods subject only to a very limited exception. This contention was rejected in *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Prices Regulations*) (1). In my opinion, the reasoning upon the basis of which that case was decided applies to meet the objection now under consideration. See also *R.* v. *Regos* (2) ; *Cody* v. *Nelson* (3). In these cases it was argued that a power to declare by regulation *any* act in contravention of *National Security Regulations* to be black marketing should be limited in some way so as to be applicable only to *some* acts in contravention of *National Security Regulations*. This argument was not accepted by the Court.

It was further contended that the *Import Licensing Regulations* were invalid because they provide that the importation of any goods shall be prohibited unless a licence to import the goods had been granted under the regulations. It was argued that this provision meant that if a licence were granted for any goods the goods could be imported, and that such a provision would be inconsistent with s. 52, which provided that certain goods should not be imported. In my opinion there is no substance in this objection. The regulations add to the prohibitions specified in the statute ; they do not purport to make importation lawful if any other provision makes it unlawful. They leave all the provisions of s. 52, pars. (*a*) to (*f*) and (*h*) and (*i*) in full operation. Further, reg. 5 of the *Import Licensing Regulations* provides that the grant of a licence under the regulations with respect to any goods . . . shall not absolve any person from the obligation to comply with the provisions of any other law relating to the importation of goods. The *Customs Act* is a law which contains many provisions relating to the importation of goods. Regulation 5 makes it plain, *ex abundanti cautela*, that all these provisions, including s. 52, are to continue to be applicable. But, apart altogether from reg. 5, the provisions of the Act would of course continue to operate.

In my opinion, therefore, the determination of the magistrate dismissing the information was erroneous in point of law, the appeal should be allowed and the case remitted to the magistrate for determination in accordance with law.

(1) (1943) 67 C.L.R. 335.
(2) (1947) 74 C.L.R. 613
(3) (1947) 74 C.L.R. 629.

RICH J. I have had the advantage of reading the judgment of my brother *Dixon* and agree with it.

The appeal should be dismissed.

STARKE J. This is an appeal which comes before this Court in the form of a case stated pursuant to the *Justices Act* of New South Wales by a stipendiary magistrate exercising Federal jurisdiction.

The respondent—the defendant—was charged under s. 233 of the *Customs Act* 1901-1936 that he unlawfully had in his possession prohibited imports, to wit, 634 diamonds. The magistrate dismissed the information for the reason that the informant did not prove that the defendant had knowledge that the diamonds found in his possession were prohibited imports.

So far as material s. 233 provides :—(1) No person shall . . . (*d*) unlawfully convey or have in his possession any smuggled goods or prohibited imports or prohibited exports. . . . (2) It shall not be lawful for any person to convey or have in his possession without reasonable excuse (proof whereof shall lie upon him) any smuggled goods or prohibited imports. (3) It shall not be lawful for any person to convey or have in his possession any prohibited exports with intent to export them or knowing that they are intended to be lawfully exported.

An Act of Parliament " may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute " (cf. *Mousell Bros. Ltd.* v. *London and North-Western Railway Co.* (1)). The presumption that the wrongfulness of an act is an essential ingredient of every offence " is liable to be displaced " by the scope of the Act creating the offence and the evils to be avoided (*Sherras* v. *De Rutzen* (2)). And the presumption is weak in the case of offences relating to the revenue, public health and so forth (cf. *Cundy* v. *Le Cocq* (3) ; *Horton* v. *Gwynne* (4) ; *R.* v. *Duke of Leinster* (5) ; *Proudman* v. *Dayman* (6)). The words of the *Customs Act* are absolute in form. No person shall unlawfully have in his possession prohibited imports. " Unlawfully," as *Denman* J. said in *R.* v. *Prince* (7) means " ' without lawful excuse,' using those words as equivalent to ' without such an excuse as being proved would be a complete legal justification for the act, even where all the facts constituting the offence exist ' ". " Cases," he adds, " may easily be suggested where such a defence might be made out, as, for

(1) (1917) 2 K.B. 836, at p. 845.
(2) (1895) 1 Q.B. 918.
(3) (1884) 13 Q.B.D. 207.
(4) (1921) 2 K.B. 661
(5) (1924) 1 K.B. 311.
(6) (1941) 67 C.L.R. 536, at p. 540.
(7) (1875) L.R. 2 C.C.R. 154, at p. 178.

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instance, if it were proved that he had the authority of a court of competent jurisdiction, or of some legal warrant." And an instance of a lawful excuse in the present case might be the seizure of prohibited imports by customs officers in the performance of their duties.

The intention of the Act to create as wide a presumption as possible of knowledge is disclosed by the sub-section declaring that it shall not be lawful for any person to have in his possession without reasonable excuse (the proof whereof shall lie upon him) any prohibited imports. The next sub-section is also important, for intent and knowledge is expressly required in the case of exports. "It shall not be lawful for any person to convey or have in his possession any prohibited exports with intent to export them or knowing that they are intended to be unlawfully exported."

In my opinion, therefore, the provisions of s. 233 are absolute unless the person in possession of prohibited goods can establish that he was in possession thereof under some lawful authority or was in possession thereof having some reasonable excuse for that possession, the proof whereof lies upon him. A reasonable excuse depends upon the facts established in evidence. The sub-section contemplates that the person in possession of the prohibited imports may not establish any legal justification for his possession and yet have a reasonable excuse.

The magistrate relied upon *Lyons* v. *Smart* (1) and *Hill* v. *Donohoe* (2) in support of his decision. But the Act has been materially amended since those decisions and the intention of the Parliament more clearly expressed in the sub-section providing that it shall not be lawful for any person to have in his possession prohibited imports without reasonable excuse. During the argument the cases of *Maher* v. *Musson* (3); *Francis* v. *Rowan* (4); and *Proudman* v. *Dayman* (5) were also referred to but they are not inconsistent with any proposition of law already stated and they do not affect the proper construction of the *Customs Act* 1901-1936 for they were decided on other Acts.

The case for the informant is that the diamonds were imported contrary to the provisions of the *Customs* (*Import Licensing*) *Regulations*, Statutory Rules 1939, No. 163, purporting to have been made under the *Customs Act* 1901-1936, ss. 52 (*g*), 56, 270.

But the defendant contends that the diamonds were not prohibited imports.

(1) (1908) 6 C.L.R. 143.
(2) (1911) 13 C.L.R. 224.
(3) (1934) 52 C.L.R. 100.
(4) (1941) 64 C.L.R. 196.
(5) (1941) 67 C.L.R. 536.

They are not included, I gather, in the schedules to the *Customs (Prohibited Imports) Regulations*, Statutory Rules 1934 No. 152, 1936 No. 69 or in any of the subsequent amendments of those regulations the latest of which appear to have been made in 1947 (See Statutory Rules 1943 No. 11, note (*c*), 1947 Nos. 66 and 81). The validity of the 1934 and 1936 regulations was established in *Radio Corporation Pty. Ltd.* v. *The Commonwealth* (1) under the powers contained in ss. 52 (*g*) and 56 of the *Customs Act* 1901-1936. Those regulations prohibited the importation of various goods, some absolutely, some subject to the consent of the Minister and some subject to certain conditions and restrictions. But, as already stated, the informant relied upon the provisions of the *Customs (Import Licensing) Regulations*, Statutory Rules 1939, No. 163.

The Act, s. 52, prohibits the importation of various articles and in sub-s. (*g*) all goods the importation of which may be prohibited by regulation.

And s. 56 provides that the power of prohibiting importation of goods shall authorize prohibition subject to any specified condition or restriction and goods imported contrary to any such condition or restriction shall be prohibited imports.

The *Customs (Import Licensing) Regulations*, 1939 No. 163, by reg. 3, provide :—The importation of any goods shall be prohibited unless—(*a*) a licence to import goods is in force and the terms and conditions (if any) to which the licence is subject are complied with ; or (*b*) the goods are excepted from the application of these regulations.

The Minister may grant a licence subject to such terms and conditions as he approves or determines and he may revoke any licence and he may also delegate his powers to a licensing officer subject to appeal to himself. The regulations apply notwithstanding that a licence or authority for the importation of goods is in force under any other law and the grant of a licence under the regulations does not absolve any person from the obligation to comply with the provisions of any other law relating to the importation of goods. The regulations are carelessly drawn. But they do not enable the Minister to licence the importation of goods prohibited by the *Customs Act* or the *Customs (Prohibited Imports) Regulations*. It is not clear, however, whether a licence is required in respect of goods the importation of which is prohibited under the regulations except with the consent of the Minister. And it is also not clear whether the licence required by the *Import Licensing Regulations* is additional to the conditions and restrictions in respect of goods the importation

(1) (1938) 59 C.L.R. 170.

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of which is prohibited under the *Prohibited Import Regulations* except subject to conditions and restrictions specified therein.

But it is established by the *Radio Case* (1) that the requirement of the consent of the Minister to the importation of goods is within the power conferred by the *Customs Act*. And it must be conceded also, in view of that decision, that the goods may be described in general terms. There is little difference between the consent of the Minister and the licence of the Minister. And the critical question is whether the regulations must particularize or identify in some manner the goods in respect of which a licence is required.

The importation of any goods is prohibited by the regulations unless a licence to import the goods is in force and the terms and conditions of the licence are complied with. But the Act applies to all goods the importation of which may be prohibited by regulation which indicates that some particularization and identification of the goods is required, even though a licence be a condition or restriction upon importation under s. 56 of the Act, and even though the description or classification of the goods may be in general terms such as may be found in the *Customs (Prohibited Imports) Regulations*.

In my judgment, however, prohibiting the importation of all goods unless with the licence of the Minister or his delegate is too wide and beyond the power conferred by the Act. The Minister and his delegate are at large. "A loose and unfettered discretion of this sort upon matters of such grave import, is a dangerous weapon to entrust to any court," or to any Minister. "Its exercise is likely to be the refuge of vagueness in decision, and the harbour of half-formed thought" (cf. *Morgan* v. *Morgan* (2)). If the language of the *Customs Act* 1901-1936 plainly requires the wide construction which has been suggested the courts must give effect to it but the words of the Act must be clear and compelling. Here they admit readily of the interpretation that some particularization or identification is required of the goods in respect of which a licence must be obtained. Moreover, as I have indicated, the relation and interaction of the *Customs (Import Licensing) Regulations* and the *Customs (Prohibited Imports) Regulations* 1934-1947 is somewhat uncertain. But that is unimportant if the *Customs (Import Licensing) Regulations* are ultra vires the *Customs Act* 1901-1936, s. 52 (*g*), as, in my judgment, they are.

The result is that the magistrate was right in dismissing the information though for reasons which he left undecided as he states in this case.

(1) (1938) 59 C.L.R. 170.

(2) (1869) L.R. 1 P. & D. 644, at p. 647.

DIXON J. The conviction appealed against is for an offence under s. 233 (1) (*d*) of the *Customs Act* 1901-1936. The foundation of the offence is the possession of prohibited imports. The goods alleged to be prohibited imports are diamonds, and the ground alleged for treating them as prohibited imports is that no licence had been granted under the *Customs* (*Import Licensing*) *Regulations* for the importation of the diamonds. Regulation 3 of those regulations, which are Statutory Rules 1939 No. 163, provides that the importation of any goods shall be prohibited unless (*a*) a licence to import the goods is in force and the terms and conditions (if any) to which the licence is subject are complied with, or (*b*) the goods are excepted from the application of the regulations.

The licence is granted by the Minister of Trade and Customs or a licensing officer to whom he delegates the power. Exceptions are made by the Minister. The person desiring to import goods must apply upon such form as the Minister directs for a licence in respect of the goods and must supply any additional information that is sought. He must give firm directions to his overseas supplier for the exportation of the goods to Australia and must inform the Collector of Customs if the goods are not despatched within a month or if the directions are countermanded or if the goods are not imported within the time specified in the licence. The Minister or his delegate may grant the licence in respect of all or part only of the goods, may impose terms and conditions, may vary or modify the terms and conditions and may revoke the licence. There is nothing to indicate the grounds upon which his discretion should be exercised. It will be seen that the purpose of the regulation is to prohibit all importation, whatever the goods, unless a licence for the particular consignment or importation is obtained from the Minister or the goods are excepted. It places the entire inward trade of the country under the control of his particular discretion or that of his delegate, exercised in respect of every separate parcel or consignment of goods which it is sought to import.

There is, of course, no doubt that the Parliament in the exercise of the power to make laws with respect to trade and commerce with other countries could enact a law in the form of the regulations if it thought fit to do so. But it has not yet done so, and it is self-evident that nothing but a clear and unmistakable expression of intention would justify a court in concluding that Parliament had delegated to the Governor-in-Council power to make such a law as a subordinate legislative authority. No delegation of power can be found under which the regulation could be made, unless it be

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s. 52 (*g*) of the *Customs Act*. I am clearly of opinion that the regulation is quite outside the scope of s. 52 (*g*). Section 52 begins:— "The following shall be prohibited imports." It then proceeds to set out nine heads, lettered from (*a*) to (*i*), of imports that are forbidden. Shortly described, they are (*a*) certain infringements of copyright; (*b*) false and counterfeit money; (*c*) blasphemy and obscenity; (*d*) prison-made goods; (*e*) exhausted and adulterated tea; (*f*) butter substitutes improperly branded; (*h*) goods as to which there is a false suggestion of governmental guarantee, warranty or concern in their production; (*i*) mineral oil and spirits not complying with prescribed restrictions. Amidst these there is the paragraph in question, namely—"(*g*) all goods the importation of which may be prohibited by regulation."

In *Baxter* v. *Ah Way* (1), *O'Connor* J. gives the following description of the plan and, as I think, purpose of these provisions: "In so far as the *Customs Act* does not deal with the imposition and collection of duties, it is founded upon the power to regulate trade and commerce with other countries. Under the latter head come the provisions which deal with prohibited imports. Now the scheme of dealing with prohibited imports in the *Customs Act* is this: By s. 50 the Act directly prohibits the importation of prohibited imports under a penalty. By another section" (s. 52) "it specifies a number of imports which it declares are prohibited. But in that list it leaves a blank to be filled up by proclamation" (now regulation) "of the Governor-General in Council, to be filled up as the Governor-General and the Executive Council may think fit in any contingency that may hereafter arise. The Act recognizes the proclamation" (now regulation) "as part of the scheme of legislation, because in s. 229 it provides that all goods imported, which are prohibited imports, shall be liable to forfeiture, but excepts goods prohibited by proclamation" (now regulation), "if they have been shipped to be imported without knowledge of the proclamation" (now regulation) "by the shipper, and before the expiration of a reasonable time for the acquisition of the knowledge at the port of shipment. The whole of the law, therefore, which operates in the case of prohibited imports is to be found in the Statute itself except the naming of the article to which these provisions are to apply". It perhaps should be added that s. 56 provides that the power of prohibiting importation of goods shall authorize prohibition subject to any specified condition or restriction, and that goods imported contrary to any such condition or restriction shall be prohibited imports.

(1) (1909) 8 C.L.R. 626, at p. 636.

It is indeed surprising to find that by combining this provision with the few simple and innocent-looking words of par. (*g*) of s. 52 the entire importing trade of the Commonwealth has been placed under direct ministerial control without the intervention of the Parliament.

Our standpoint in matters of interpretation is doubtless affected by what we have grown accustomed to and after two wars, during which the Executive Government necessarily took over a great part of the legislative function, we can hardly be expected to have the same sensibilities as formerly in defining a power of subordinate legislation. But the provisions were passed in 1901 and, with the unimportant change of the word " proclamation " to " regulation " made to bring the instrument within the requirement that it should be laid before the Houses of Parliament, and with an immaterial alteration in par. (*a*), they have remained in the same form.

Can it really be supposed that in the first year of the Parliament, legislation was consciously framed enabling the Executive Government to forbid all importation except by licence from the Minister ? The licence indeed is only a qualification or condition ; to support it the power conferred by par. (*g*) must authorize the absolute suppression by the Executive of all importation into the Commonwealth. Imagine such a meaning being attached in 1901 to par. (*g*) ! Yet, however much we may have changed, the meaning of the paragraph has not. The four judges who decided *Baxter* v. *Ah Way* (1) did not dream of it. *Griffith* C.J. treated the provision in s. 52 (*g*) as remitting to the Executive the duty of deciding a question of fact, viz., " The expediency of admitting *particular goods* into the Commonwealth at a particular time " and another question of fact, " Whether it is desirable or reasonable that goods in a certain condition should be excluded " (2). *O'Connor* J. spoke of the provision as leaving " the filling up of the blank, and the *naming* of the article in each contingency that may happen in the future . . . to the absolute discretion of the Governor-General in Council " (3). *Isaacs* J. said :— " The sub-section . . . empowers the Governor-General to prohibit goods by proclamation, and read with s. 56 enables him to do so subject to conditions or restrictions. But nothing more. The proclamation stands *per se* as a mere notification to the world that *specified goods* are prohibited. The proclamation is a mere fact " (4).

In a rhetorical question *Higgins* J. shows his view of the paragraph :— " Why should not a provision be valid to the effect that

(1) (1909) 8 C.L.R. 626.
(2) (1909) 8 C.L.R., at p. 635.
(3) (1909) 8 C.L.R., at p. 637.
(4) (1909) 8 C.L.R., at p. 641.

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all goods *named*, from time to time, on a black list to be kept by the Governor-General, shall be prohibited imports, shall not be imported ? " (1).

It is apparent that much of s. 52 was suggested by provisions of State legislation, themselves taken from English provisions : see, for example, the Victorian *Customs and Excise Duties Act* 1890, s. 49 and s. 57, and 39 and 40 Vict. c. 36, s. 42 and s. 43 : 42 and 43 Vict. c. 21, s. 5 : 49 and 50 Vict. c. 41, s. 2, and 52 and 53 Vict. c. 42, s. 2 : 60 and 61 Vict. c. 63, s. 1. Section 43 of 39 and 40 Vict. c. 36, on which was based s. 57 of the Victorian Act, provided that the importation of arms, ammunition, gunpowder *or any other goods* may be prohibited by proclamation or Order in Council. To this provision *Isaacs* J. (2) referred as an example of how " in England for a very long period Parliament has legislated in a similar manner " to par. (*g*) of s. 52, and he quoted *Hamel, Laws of the Customs*, (1854) p. 106, as saying of the provision— " This power, though seldom exercised, is a wholesome provision for defensive as well as sanitary purposes." A much more extensive use of the provision was, however, attempted between 1916 and 1920, and when the validity of a proclamation prohibiting the importation in Great Britain of a long list of articles was under attack in *Attorney-General* v. *Brown* (3), the Attorney-General claimed that the words " any other goods " gave the Crown a general power to prohibit the importation of goods of every kind. In the argument *Sankey* J. observed to him : " You may be right in saying that under the Order in Council the whole of the free imports of the country could be stopped, but it is a little astonishing " (4). In his judgment his Lordship said :— " The learned Attorney did not shrink from the consequences of his argument. He admitted that if it was correct it was open to the Executive, on their own motion, to prohibit the importation of corn and meat into this country entirely, or, at any rate, to prohibit the importation of corn, meat, and other articles from certain countries while allowing them to come in free from other countries. His answer was that it was easy to put cases which were grotesque, but that it must be assumed that where a discretion is left in the hands of the donee of a power it was thought and considered that the donee would exercise it reasonably. This argument appears to beg the question, which is not whether the donee would exercise a power reasonably, but whether he has the

(1) (1909) 8 C.L.R., at p. 645.
(2) (1909) 8 C.L.R., at p. 640.
(3) (1920) 1 K.B. 773 ; 36 T.L.R. 165 ; (1921) 3 K.B. 29.
(4) (1920) 36 T.L.R., at p. 166.

power at all, and upon such an issue it is not immaterial to consider the magnitude of the power alleged to be conferred" (1). So far as general considerations are important, the analogy is close. But *Sankey* J. restricted the general words by the *ejusdem generis* rule of construction, a course which is not admissible in s. 52 (*Radio Corporation Pty. Ltd.* v. *The Commonwealth* (2)). There are, however, particular considerations in the present case which combine with the foregoing more general considerations. As it appears to me they demonstrate the irrelevance of the power conferred by s. 52 (*g*) to what the *Customs* (*Import Licensing*) *Regulations* seek to do.

In the first place, the scope and object of the regulations are plain. It is their purpose to invest the Minister with a control by the licensing of all inward overseas commerce in goods. The regulations are concerned with the control by administrative act of importation irrespective of the goods to be imported. The prohibition is universal. It ignores every attribute of the goods to be imported, every circumstance or condition connected with the goods as such or with their importation or arising thereout or consequential thereon. The regulations are directed to importation alone, and in relation to importation they do nothing except establish a licensing system so that all importing may be administratively controlled. The barest reading of s. 52 shows that par. (*g*) is concerned with placing goods in a category, a category of prohibited imports. Let it be supposed that the category may be indefinitely large, that it may be framed in completely general terms, that the conditions chosen to bring goods within the category need not relate to physical attributes of the goods or to the purposes to which they may be put, but may relate to their source, provenance or other circumstances accidental to the goods as goods. These are suppositions which I should not adopt as true. But if they be accepted, they do not meet the objection that the regulations are addressed to an entirely different purpose. It is a purpose remote from the prohibition of the importation of goods because they fall within a category. The purpose is that of establishing an administrative regulation of inward foreign commerce in goods by a system of discretionary licensing. That is a purpose which I should have thought to be plainly outside the scope and purpose of the power conferred upon the Executive by s. 52 (*g*).

In the second place, upon the face of s. 52 it appears clearly enough to be concerned with the prohibition of imports as an exceptional measure, and this is true of all of Div. 1 of Part IV. The key to the whole *Customs Act* is the "due importation of goods,"

(1) (1920) 1 K.B., at pp. 790, 791. (2) (1938) 59 C.L.R., at p. 181.

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a phrase used in s. 49, which, " for the purpose of securing the due importation of goods," provides for the boarding of ships, the reporting of cargo and the entering, unshipping and examination of goods. The whole of the customs legislation, including the tariff, is framed to deal with a continual flow of goods into the country, to subject the goods to the control of the customs, to provide a procedure for the due introduction of the goods into the country and to collect the duties levied by Parliament upon them. The prohibition of imports is exceptional. The legislature has provided a short list and included a power enabling the Executive to add to it. Of course the *Customs (Import Licensing) Regulations* do not really intend to prohibit the importation of goods. They do not belie their title. They really intend only to license importation, and that is why I have said that they are outside the scope and object of the power given by s. 52 (*g*). But, because they could not be justified unless under s. 52 (*g*) it was necessary to frame them as regulations prohibiting the importation of all goods subject to a condition by way of dispensation, that is to say, to prohibit all importation unless the importer has a licence or the goods are excepted. The validity of reg. 3 therefore depends on the proposition that under the power given by par. (*g*) of s. 52 to add to the list of prohibited imports the Executive may prohibit the importation of all goods whatsoever. Such a proposition appears to me to be directly opposed to the tenor of Division 1 in its entirety and of s. 52 in particular. The proposition invokes a power to exclude goods exceptionally, in order to prohibit all overseas inward commerce in goods. The very words with which s. 52 opens—" the following are prohibited imports "—indicate that a list of particulars is to ensue. Write into the list " all goods " and how incongruous it would be with the opening words. It would run—The following are prohibited imports—(*g*) all goods. The words of par. (*g*) " All goods the importation of which may be prohibited by regulation " have quite a different meaning from " the importation of all goods may be prohibited." They have the same meaning as " goods the importation of which &c." or " Any goods the importation of which &c." or " Such goods as may be declared by regulation to be prohibited imports." The paragraph is framed so that the Executive must form its opinion concerning the prohibition of particular goods or descriptions of goods. However large the class or classes chosen may be, or however often it may be done, the power assumes that the discretion will go to particular classes or descriptions and is inconsistent with a universal prohibition which is neither based on nor takes into account anything in

reference to the goods. For this second reason I think that the regulations are outside the power given by s. 52 (*g*).

In the third place, I am of opinion that a regulation under s. 52 (*g*) must name the goods. They will, of course, be named by description. But the description must be such as to enable merchants and others to ascertain what classes of goods according to their nature are prohibited imports. This is the view taken of the provision in *Baxter* v. *Ah Way* (1) and in my opinion it is the natural meaning of the words of par. (*g*) when read in its place in the catalogue of prohibited imports contained in s. 52. It is, I think, supported by the tendency of ss. 229 (*b*), 231 (1) (*a*), 233 and 233B. In *Radio Corporation Pty. Ltd.* v. *The Commonwealth* (2) the *Customs* (*Prohibited Imports*) *Regulations* and the amendment of the *Customs* (*Prohibited Imports*) *Regulations* there upheld listed the goods specifically.

That decision does not appear to me to be an authority affecting any of the grounds I have assigned for holding that the *Customs* (*Import Licensing*) *Regulations* are invalid. There are additional grounds, independent grounds, for saying they are invalid in the dissenting judgment of *Evatt* J. and myself, but in deference to the decision of the majority I have not taken those into account.

In my opinion the regulations are void. In this view the other objections relied upon by the appellant do not arise.

I think that the appeal should be dismissed.

McTiernan J. In this case I agree with the judgment of the Chief Justice. I add a reference to *Bruhn* v. *The King* (3).

Williams J. I agree with the judgment of the Chief Justice.

Appeal allowed with costs. Order of magistrate set aside. Case remitted to magistrate to be dealt with in accordance with law.

Solicitor for the appellant, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

Solicitors for the respondent, *Creagh & Creagh*.

J. B.

(1) (1909) 8 C.L.R. 626.
(2) (1938) 59 C.L.R. 170.
(3) (1909) A.C. 317, at p. 324.