

H. C. OF A.
1952.

WATKINS

v.

WATKINS.

Dixon C.J.
McTiernan J.
Taylor J.

such implication. When she spoke to him about the terms of the solicitor's letter he turned his back on her and walked away. The letter conveying the terms was sent in February 1951. The appellant said in evidence that since Christmas 1947 she wanted to leave the house but her parents could not conveniently have her permanently and she has been unable to find other suitable accommodation.

Clearly at Christmas 1947 the respondent caused a complete breach in the matrimonial relationship. It is not easy to see what elements of the relationship remained. The fact that he did not leave the house had no effect in preserving any of those elements. On the contrary, it had the opposite result. He turned the occasions which their living under the same roof and meeting at table might have provided for maintaining the consortium into opportunities to wound the appellant's feelings and to show that his separation from her was complete and permanent. He was attempting to drive her away from him. It was she who did not go. Indeed she could not. She would, of course, have been justified in leaving the house and her departure would have been attributed to his constructive desertion. However, she stayed in the house, suffered and was passive under his ill-treatment. *Dean J.* described it as "beastly". But his Honour was of the opinion that by taking meals in the appellant's company at the house, by giving her money out of which she provided food for him and by taking advantage of her domestic services, including cooking, the respondent kept enough of the matrimonial relationship on foot. The respondent's treatment of her at table was proof of his rejection and not of his acceptance of her as his wife. The payment of her allowance was made in a manner which indicated, not that he was maintaining a consortium or co-habitation, but rather that so far as he could do it he was persisting in its termination. There was nothing to show that he recognized the cooking of meals and the performance of other domestic duties as services incident to the relations of husband and wife. His Honour did not add the circumstance that the parties slept in the same bedroom until about two years before the petition to the matters which he thought precluded his making a finding of desertion. But for this circumstance we should have but little hesitation in holding upon the evidence that at Christmas 1947 the respondent permanently put an end to the state of co-habitation existing between the parties.

We have hesitated, however, to apply the authorities because in that earliest part of the period in respect of which it was necessary for the petitioner to prove desertion she had not taken her bed

to another room. As already stated, the beds were at opposite ends of the same room and we think there can be no real doubt in this particular case that he treated her just as if he was compelled to share a room with a stranger. The circumstance that the parties slept in the same room for part of the relevant period was not necessarily inconsistent with the hypothesis that the matrimonial relationship was completely terminated by the respondent. But it is hardly necessary to say that as an evidentiary circumstance it offers a very strong argument against the conclusion of fact that there was such a termination. In this case the facts do not depend on the evidence of the wife. There is strong evidence of her brother and sister-in-law. We conclude from the evidence that the respondent had resolved at least as far back as Christmas 1947 to treat the appellant as completely beyond his recognition as a wife. Having regard to his conduct, it is not too much to say that he resolved even to treat her as beyond recognition as a human being. He adopted and persisted in an attitude which unequivocally meant that he treated the marriage as at an end and regarded her presence in the house as a misfortune which he was determined to ignore. As far as he was concerned there was a complete withdrawal from co-habitation. Taking the evidence of his conduct, it would be entirely unreal to treat the fact that she slept in a bed at the remote end of the bedroom in which he slept as evidence that he had not put an end to co-habitation. As a state of things he brought it completely to an end and intended to cause her, as far as he could, to separate herself from him in all respects. The simple fact is that she did not remove herself, as presumably he intended, from the bedroom. Upon the evidence, it is not open to doubt that he did not mean any part of the matrimonial relationship to continue.

Both the animus and the factum of desertion are of course necessary. In this case it is the factum that is in question. As we have already said, the case is difficult, but the facts appear to us to be very special and the evidence unusually cogent. We think that the respondent could not have severed the matrimonial relationship more effectively if he had gone elsewhere to live. The mere fact that he stayed in the house did not, in all the circumstances, keep alive the conjugal society of these parties. In spite of the hesitation which we have felt because of some facts of the case tending to give a semblance of the continuance of a common life, we think that the proper inference is that the respondent deserted the appellant more than three years before the petition.

H. C. OF A.
1952.

WATKINS
v.

WATKINS.

Dixon C.J.
McTiernan J.
Taylor J.

H. C. OF A. 1952.
 {
 WATKINS
 v.
 WATKINS.

The authorities which apply to this case are *Drake v. Drake* (1) ; *Simons v. Simons* (2) ; *Power v. Power* (3) ; *Campbell v. Campbell* (4). The facts in this case are especially comparable with those in *Power v. Power* (3). It is not contrary to such decisions as *Hopes v. Hopes* (5) and *Walker v. Walker* (6), to find upon the evidence in this case that the respondent separated himself from his wife and ended his marital relations with her.

The appeal should be allowed, the judgment of the Supreme Court set aside and a decree nisi for dissolution made.

Appeal allowed with costs ; discharge the decree of the Supreme Court ; in lieu thereof pronounce a decree nisi for the dissolution of marriage ; and order the respondent to pay costs of the suit. Order that the appellant do cause an office copy of this order and decree nisi to be lodged with the Prothonotary of the Supreme Court.

Solicitors for the appellant : *Fairlie & Reaburn.*

R. D. B.

- (1) (1896) 22 V.L.R. 391.
(2) (1898) 24 V.L.R. 348.
(3) (1944) V.L.R. 247.

- (4) (1951) 51 S.R. (N.S.W.) 158 ;
68 W.N. 174.
(5) (1949) P. 227.
(6) (1952) 2 All E.R. 138.

Cons R v Smithers; Ex parte McMillan 152 CLR 477	Appl R v Smithers; Ex parte McMillan 57 ALJR 125	Appl Davis v Cth 82 ALR 633	Foll Pearce v Button 65 ALR 83	Cons Comr of Aust Federal Police v Cox 14 FCR 279	Appl Nationwide News Pty Ltd v Wills (1992) 108 ALR 681	Appl Nationwide News Pty Ltd v Wills (1992) 108 ALR 681	Appl Public Prosecutions, Director of; Ex parte Lawler (1994) 68 ALJR 289	Cons Mutual Pools & Staff Pty Ltd v Common- wealth (1994) 68 ALJR 216
86 C.L.R.]		Appl Public Prosecutions, Director of; Ex parte Lawler (1994) 119 ALR 655	Foll W S G A L Pty Ltd v TPC (1994) 122 ALR 673	Cons Mutual Pools & Staff Pty Ltd v Common- wealth (1994) 179 CLR 155	Foll Public Prosecutions, Director of v Toro-Martinez (1993) 119 ALR 317	Appl Public Prosecutions, Director of v Toro-Martinez (1993) 33 NSWLR 82	Appl Public Prosecutions, Director of v Toro-Martinez (1993) 71 ACrimR 326	169
Cons W S G A L Pty Ltd v Trade Practi- ces Comm (1994) 51 FCR 115	Cons Western Mining Corp v Common- wealth (1994) 50 FCR 305	Appl Public Prosecutions, Director of v Rogers (1993) 114 FLR 354	Appl Della Patrona v DPP (Cth) (No2) (1995) 132 ALR 307	Appl Dellapatrona v DPP (Cth) (No2) (1995) 83 ACrimR 208	Cons Leask v Common- wealth of Australia (1996) 70 ALJR 995	Foll Customs, Comptroller- General of v Kingswood Distillery Pty Ltd (1996) 135 FLR 411	Foll Customs, Comptroller- General of v Kingswood Distillery Pty Ltd (1996) 135 FLR 411	Appl Obers Co v Commonwealt h (No4) (2004) 205 ALR 432
								Cons Silbert v DPP (WA) (2004) 78 ALJR 464

[HIGH COURT OF AUSTRALIA.]

BURTON PLAINTIFF,

AND

HONAN DEFENDANT.

ON REMOVAL FROM THE SUPREME COURT OF QUEENSLAND.

Constitutional Law (Cth.)—Customs—Statute—Validity—Forfeiture of goods— H. C. OF A.
Seizure—Condemnation—The Constitution (63 & 64 Vict. c. 12), s. 51 (i.), 1952.
(ii.), (xxxi.), (xxxix.)—Customs Act 1901-1950, (No. 6 of 1901—No. 56 of
1950), ss. 203, 229, 262. BRISBANE,

Customs—Forfeiture—Seizure of goods in hands of bona-fide purchaser for value—
Customs Act 1901-1950 (No. 6 of 1901—No. 56 of 1950). June 23.
Dixon C.J.,
McTiernan,
Webb and
Kitto JJ.

Sections 229 and 203 of the *Customs Act* 1901-1950, which provide respec-
tively for the forfeiture of certain goods and their seizure, and s. 262, which
provides that a conviction of any person for an offence causing forfeiture of
goods shall operate as a condemnation of the goods, are valid exercises of the
legislative power of the Commonwealth as laws relating to customs and matters
incidental thereto whether such laws are regarded as relating to trade and
commerce (s. 51 (i.)) or taxation (s. 51 (ii.)).

The forfeiture imposed by s. 262 is so imposed as part of the incidental
powers for the purpose of vindicating the Customs laws and is not an acquisi-
tion of property within the meaning of s. 51 (xxxi.) of the Constitution for
any purpose in respect of which the Parliament is empowered to make laws.

Nature of the “ incidental power ” (The Constitution, s. 51 (xxxix.)) dis-
cussed.

The *Customs Act* 1901-1950 validly empowers an officer of Customs to seize
forfeited goods although they have passed into the hands of a bona-fide
purchaser for value.

REFERENCE under s. 18 of *Judiciary Act* 1903-1950.

In proceedings instituted in the Supreme Court of Queensland
before *Macrossan* C.J. James Hayden Burton claimed from V. J.
Honan trading as “ Brunswick Street Used Cars ” £2000 damages
for a breach of an implied warranty under *The Sale of Goods Act*

H. C. OF A.
 1952.
 BURTON
 v.
 HONAN.

of 1896 (Q.) for the quiet possession of a motor car, a 1949 Buick sedan, bought by the plaintiff from the defendant for £2,000. The statement of claim alleged that the warranty was broken in that (a) on or about 22nd December 1950, the motor car was lawfully seized as forfeited to the Crown pursuant to the provisions of the *Customs Act* 1901-1950; and (b) on or about 23rd April 1951, in Sydney, New South Wales one Reginald Aubrey Doyle, to whom the car had been released by the Customs and who had sold it to the defendant, was convicted of three offences against the said Act in relation to the importation of the motor car into Australia whereby the car was condemned and became the property of the Crown in the right of the Commonwealth of Australia.

By the defence, the defendant set up, *inter alia*, that if the motor car was seized, such seizure was unlawful and the car had not lawfully become forfeited to and become the property of the Crown.

In consequence of ss. 38A and 40A of the *Judiciary Act* 1903-1950 *Macrossan* C.J. was of the opinion that the action was removed to the High Court.

The matter came before *McTiernan* J., who, after hearing some of the argument, made an order under s. 18 of the *Judiciary Act* 1903-1950, that it be referred to the Full Court to consider all *inter se* questions arising at the hearing of the case before the Supreme Court. These questions concerned the validity and construction of ss. 203, 229 (b) (i) and 262 of the *Customs Act* 1901-1950, the provisions of which are as follow :

“ 203. Any officer of His Majesty’s forces or any officer of Customs or police may seize any forfeited ship aircraft or goods upon land or water or any ship aircraft or goods which he has reasonable cause to believe are forfeited.

229. The following goods shall be forfeited to His Majesty :— . . . (b) All goods imported which are prohibited imports excepting only goods the importation of which is prohibited by regulation or proclamation and which shall have been shipped to be imported without knowledge of the regulation or proclamation by the shipper and before the expiration of a reasonable time for the acquisition of knowledge thereof at the port of shipment . . . (i) All goods in respect of which any invoice declaration answer statement or representation which is false or wilfully misleading in any particular has been delivered made or produced.

262. Where the committal of any offence causes a forfeiture of any goods the conviction of any person for such offence shall have effect as a condemnation of the goods in respect of which the offence is committed ”.

M. B. Hoare, for the defendant. There is an automatic forfeiture at the moment of the offence without any further proceedings for condemnation being necessary: *The Annandale* (1). In that case the court was dealing with a plenary legislative power and the question whether the particular sections of the statute were ultra vires was not raised: *Little's Victory Cab Co. Pty. Ltd. v. Carroll* (2) and *Owens v. Collector of Customs for New South Wales* (3) were wrongly decided. At common law forfeiture does not relate back to the unlawful act: *R. v. McCleverty (Telegrafo or the Restauracion)* (4). The power to legislate on the matter of prohibiting imports rests upon s. 51 (i.) of the Constitution: *Baxter v. Ah Way* (5), *Poole v. Wah Min Chan* (6). It is conceded that at the moment of importation there is power under the trade and commerce power to provide for a forfeiture, provided the forfeiture is effected and the goods dispossessed at the moment of importation. But when the goods pass into home consumption a title is created in the importer, which is a possessory title against the world except the actual owner: *Armory v. Delarmirie* (7). The right to possession is a right of property and the taking of that right away amounts to an acquisition of property, which must be on just terms. The expression "just terms" is wider than "just compensation": *Commonwealth v. Huon Transport Pty. Ltd.* (8); *Minister of State for the Army v. Dalziel* (9). There is no provision in ss. 203, 209, and 262 of the *Customs Act* 1901-1950, giving the owner or person from whom the goods are seized the right to be heard before the goods are condemned. It is an ingredient of "just terms" that the individual who may be deprived of his property has the right to be heard in the proceedings. Here the defendant, by the delivery by the Customs out of their control, acquired a possessory right to the motor car of which he was deprived contrary to s. 51 (xxxi.) of the Constitution. [On the question of forfeiture he referred to *United States v. 1960 Bags of Coffee* (10); *M'Lane v. United States* (11); *Stockwell v. United States* (12); *United States v. Stowell* (13)]. Parliament cannot legislate, under s. 51 (i.) of the Constitution, with regard to goods after they have

H. C. OF A.

1952.

BURTON

v.

HONAN.

(1) (1877) 2 P.D. 179, 218.

(2) (1948) V.L.R. 249.

(3) (1940) 40 S.R. (N.S.W.) 605; 57 W.N. 229.

(4) (1871) 8 Moo. (N.S.) 43 [17 E.R. 229].

(5) (1909) 8 C.L.R. 626, at p. 636.

(6) (1947) 75 C.L.R. 218, at p. 236.

(7) (1722) 1 Stra. 505 [93 E.R. 664].

(8) (1945) 70 C.L.R. 293, at p. 337.

(9) (1944) 68 C.L.R. 261, at pp. 285, 286.

(10) (1814) 8 Cranch 398 [3 Law. Ed. 602].

(11) (1832) 6 Peters 404 [8 Law. Ed. 443].

(12) (1871) 13 Wallace 531 [20 Law. Ed. 749].

(13) (1889) 133 U.S. 1 [33 Law. Ed. 555].

H. C. OF A.
1952.

BURTON
v.
HONAN.

passed into home consumption. Once goods pass into home consumption the legislation would cease to be an Act dealing with trade and commerce with other countries and among the States. In this case there is a motor car, with which there is nothing inherently wrong and motor cars are in use and are frequently imported into this country, so that the power of the Commonwealth is exhausted when the importation is complete. Customs duties are imposed on the act of importation. On importation the Commonwealth powers cease except in so far as they are incidental. A forfeiture after the goods have passed into general commerce and consumption goes further than the protection of the revenue reasonably requires and therefore is not necessarily incidental: *Attorney-General for New South Wales v. Collector of Customs for New South Wales* (1). Immigrants may become by lapse of time members of the community and cease to be subject to the legislative powers of the Commonwealth in relation to immigrants and aliens: *O'Keefe v. Calwell* (2); *Koon Wing Lau v. Calwell* (3). In the case of goods, then *a fortiori*, the Commonwealth cannot enforce a power of forfeiture of the complete title to the goods, once they have passed the Customs and passed into home consumption.

A. L. Bennett Q.C. (with him *H. J. Bonham*), for the Commonwealth (intervening by leave). Section 262 of the *Customs Act* 1901-1950 is not a law relating to the acquisition of goods. The argument submitted on behalf of the defendant is that there is no power of confiscation at all under a fiscal or taxation Act. The question of acquisition is irrelevant and s. 51 (xxxi.) of the Constitution has no operation in respect of a law of taxation which imposes forfeiture. The justice of the forfeiture is a matter for the legislature. These features are normal features of customs legislation and the Commonwealth Parliament has been given plenary powers in respect of customs. The position as to goods is entirely different from that of immigrants. A person may change his status as an immigrant by his actions, but it cannot be suggested that stolen goods change their status because they have passed into trade. On the defendant's argument goods smuggled into the country or passed through the Customs by fraud, once they are sold to an innocent purchaser are outside the control of Customs. The forfeiture of the car took place immediately the grounds of forfeiture as set out in s. 229 of the Act existed; and even before

(1) (1908) 5 C.L.R. 818.

(2) (1949) 77 C.L.R. 261, at p. 288.

(3) (1949) 80 C.L.R. 533, at pp. 560, 561, 587-590.

and in the absence of condemnation proceedings: ss. 52, 203, 229 (b) and (i), 233, 234, 262. This result follows from s. 229, and is recognised in s. 262, and is supported by the authorities. [He referred to *The Annandale* (1); *De Keyser v. British Railway Traffic and Electric Co. Ltd.* (2); *Little's Victory Cab Co. Ltd. v. Carrol* (3) and *Owens v. Collector of Customs for New South Wales* (4).] Judicial opinions expressed in this Court have been to the same effect: [He referred to *Lyons v. Smart* per O'Connor J. (5) and per Isaacs J. (6); *Willey v. Synan* per Latham C.J. (7); per Dixon J. (8), and per McTiernan J. (9). He also referred to *Origet v. United States* (10), and *Caldwell v. United States* (11).] The consequence is that the title in the car vested in the Crown, and the importer had no title to give—*nemo dat qui non habet*. [He referred to *The Sale of Goods Act of 1896* (Q.), ss. 15, 24; *The Annandale* (1); *Rowland v. Divall* (12).] It follows that the Commonwealth legislation does not interfere with domestic trade and operate on goods after they have been passed into home consumption. Normal consequences flow by reason of the application of State law, as where there is a lack of title in stolen goods. The sections of the *Customs Act* which are challenged are valid. The sources of Commonwealth power are ss. 51 (i.) and (ii.) of the Constitution, par. (i.) being that appropriate to the prohibition of entry. Though these are the sources of power, the scope of the power as to customs should be ascertained from a reading of the whole document, and particularly ss. 52 (ii.), 69, 70, 86, and 90. The Constitution did not confer on the Commonwealth powers less than those of the States, and less than those the Commonwealth was required to administer, pending the imposition of uniform duties within two years after the establishment of the Commonwealth. The historical approach throws much light on the problem, and has frequently been adopted by the Justices. [He referred to *The Colonial Sugar Refining Co. Ltd. v. Irving* (13), per Griffith C.J.; *R. v. Sutton* (14); *Baxter v. Ah Way* (15); *G. G. Crespín & Son v. Colac Co-operative Farmers Ltd.* (16); *Radio Corporation Pty. Ltd. v. The Commonwealth* (17).] Forfeiture, as soon as the offence is committed, or if other grounds

H. C. OF A.

1952.

BURTON

v.

HONAN.

(1) (1877) 2 P.D. 218.

(2) (1936) 1 K.B. 224.

(3) (1948) V.L.R. 249.

(4) (1940) 40 S.R. (N.S.W.) 605; 57 W.N. 229.

(5) (1908) 6 C.L.R. 143, at p. 161.

(6) (1908) 6 C.L.R., at pp. 165, 166, 170.

(7) (1937) 57 C.L.R. 200, at p. 212.

(8) (1937) 57 C.L.R., at p. 214.

(9) (1937) 57 C.L.R., at pp. 231, 232.

(10) (1887) 125 U.S., 240, at p. 246 [31 Law. Ed. 743, at p. 746].

(11) (1850) 8 Howard 366, at pp. 378, 379 [12 Law. Ed. 1115, at p. 1120].

(12) (1923) 2 K.B. 500.

(13) (1903) Q.S.R. 261, at p. 271.

(14) (1908) 5 C.L.R. 789.

(15) (1909) 8 C.L.R. 626.

(16) (1916) 21 C.L.R. 205.

(17) (1938) 59 C.L.R. 170.

H. C. OF A.
1952.

BURTON
v.
HONAN.

exist, has always been an ordinary feature of Customs law. [He referred to *The Customs Consolidation Act*, 1876 (Imp.) (39 & 40 Vict. c. 36); *The Customs Act of 1873* (Q.); *Customs Regulation Act* 1845 (N.S.W.); *Customs Act* 1890 (Vict.); *The Customs Act*, 1861 (Tas.).] All sections now attacked are common features of those Acts, with the exception of s. 262. That appears to be unique. Condemnation following forfeiture is part of the law of Customs, and although s. 262 provides a novel method, it is within the subject matter with which the Commonwealth may deal. In spite of the absence of provisions for notice, condemnation thereunder is tantamount to a judgment *in rem*, good against all the world. The argument that this was acquisition without just terms was untenable. Paragraph (xxxi.) of s. 51 of the Constitution does not apply to penalty provisions or taxation.

D. B. O'Sullivan, for the plaintiff. The sections of the *Customs Act* 1901-1950, which have been challenged do not violate s. 51 (xxxi.) of the Constitution. When the defendant purported to purchase the car from Doyle the car had already been forfeited to the Crown and the defendant obtained no title. The defendant's argument is based on a title acquired by the Customs allowing the goods to pass into home consumption. There could be no consent on the part of the Customs, if the permit was obtained by fraud as it was in this case. The seizure of the car was not an acquisition of property within the meaning of the Constitution. The power to prohibit imports carries with it an incidental power to make the prohibition effective by means of seizure and forfeiture after the goods have passed through the Customs. For the rest counsel adopted the argument of counsel for the Commonwealth.

M. B. Hoare in reply. The argument put forward on behalf of the defendant is not that the Commonwealth by seizure forfeiture and condemnation has acquired a title to the goods, but that thereby the Commonwealth has deprived the pseudo owner of his possessory title. By permitting the goods to pass into home consumption a possessory title is acquired by the importer which may be passed on to any number of persons. Failure to give notice of the proceedings, is more than a matter of procedure but is the deprivation of a right to contest the forfeiture.

DIXON C.J. This matter is a reference from a judge sitting in the original jurisdiction dealing with a matter coming before him in consequence of ss. 38A and 40A of the *Judiciary Act* 1903-1950.

The matter came before his Honour, Mr. Justice *McTiernan*, who, having heard some argument, made an order that it be referred

to the Full Court to consider all *inter se* questions arising upon the evidence adduced at the hearing of the case before the Supreme Court. The proceeding is an action instituted in the Supreme Court in the ordinary way by writ of summons. The action was by the purchaser of a motor car against the vendor and the cause of action was based on *The Sale of Goods Act of 1896* (Q.). The provision of *The Sale of Goods Act* upon which the cause of action arose was the familiar one which entitles the buyer of goods to an implied warranty that he shall have and enjoy quiet possession of the goods he takes under the sale. The motor car was seized in the hands of the purchaser by the Customs as goods forfeited to the Crown pursuant to s. 229 of the *Customs Act 1901-1950*. The car was an American automobile which was imported in 1950. It was actually landed on or about 24th April 1950, by one Doyle. It would appear that Doyle had not at that time a licence for the importation of the goods and under the *Customs (Import Licensing) Regulations* such a licence was necessary. He did, however, obtain one, and the goods after entry for home consumption, pursuant to the licence, were delivered out of the control of the Customs. It would seem that in obtaining the licence he made a representation which subsequently the Customs authorities came to regard as untrue. At all events, he was prosecuted under three informations upon which he was convicted.

The first conviction was for that on 2nd May 1950, he, Doyle, did mislead an officer in a particular likely to affect the discharge of his duty, in that in relation to an application for a licence, pursuant to the *Customs (Import Licensing) Regulations*, he did represent to such officer that a certain Buick 1949 second-hand car was a bona-fide gift to him from a certain person, whereas the fact was that the motor car was not a bona-fide gift to him from that person.

The second information was for that he did make on the same date in a document produced to an officer, to wit an application for a licence pursuant to the *Customs (Import Licensing) Regulations*, a statement which was untrue in a particular, in that he did state therein that the same car was a gift from a consignor, whereas it was not. Lastly, the third information was for that he did import the car when it was a prohibited import.

Section 229 (b) of the Act says that the following goods shall be forfeited to the Crown—all goods imported which are prohibited imports—subject to certain exceptions. Section 229 (i) says that all goods in respect of which any entry, invoice, declaration, answer, statement or report which is false in any particular has been delivered, made or produced are forfeited to the Crown.

H. C. OF A.
1952.

BURTON

v.

HONAN.

Dixon C.J.

H. C. OF A.
1952.

BURTON

v.

HONAN.

Dixon C.J.

On the basis of that conviction, so far as Doyle was concerned, the car was then to be regarded as a prohibited import forfeited to the Crown.

But s. 262 of the Act provides that where the committal of any offence causes a forfeiture of any goods the conviction of any person for such an offence shall have effect as a condemnation of the goods in respect of which the offence is committed.

The convictions, therefore, would have under that provision, the effect of condemning the goods, the car, as goods in respect of which an offence had been committed.

Now the history of the car after it was introduced into the country by the importation on 24th April 1950, is this. It was released to Doyle by the Customs. Doyle sold it to the defendant, one Honan, on 30th June 1950. The defendant Honan thereupon sold it to the plaintiff Burton on 14th July 1950, and in the plaintiff Burton's hands it was seized by the Customs on 22nd December 1950. The convictions took place on 23rd April 1951.

On authority it is clear that under the provisions of s. 229, provided the facts exist which justify a forfeiture, the title to the goods vests in the Crown when the forfeiture takes place in consequence of the occurrence of the facts. No further proceedings are requisite to make title, although of course further proceedings may be necessary either to vindicate the title of the Crown or to exclude the claim of some person asserting a right to the goods.

In point of fact elaborate provisions are made in the *Customs Act* for the seizure of the goods, for lodging a claim when the goods are seized, and for a notice requiring the claimant to proceed to establish his title to the goods. Those provisions, which for the purposes of this case it is unnecessary to discuss, are s. 203 to s. 207. The plaintiff Burton in fact gave notice under s. 205 but we are not informed whether he was required to pursue his notice by entering an action under s. 207.

In the proceedings in the Supreme Court the facts which I have stated were ascertained and the purchaser of the goods relied upon the provisions to which I have referred as provisions showing that he had lost title to the goods. He relied upon the seizure as disturbing his peaceful possession of the goods and he contended that the implied warranty under *The Sale of Goods Act* therefore gave him a right to damages. The vendor, however, answered him by saying that the relevant provisions of the *Customs Act* under which all this was done were invalid as being beyond the powers of the Commonwealth. That allegation necessarily raised a question as

to the limits *inter se* of the constitutional powers of the Commonwealth and the constitutional powers of the State. Upon that arising, s. 38A of the *Judiciary Act*, as it has been construed and upheld in this Court, put an end to the jurisdiction of the Supreme Court to proceed with the matter, and s. 40A of the *Judiciary Act ipso jure* transferred the proceedings into this Court. It was in that manner that they were brought before *McTiernan J.*

It will be seen that the residual question upon which the rights of the parties appear to depend is the validity of the material provisions of the *Customs Act*. Now s. 229 upon which the forfeiture rests contains a list of goods which are forfeit to the Crown when the conditions which the earlier paragraphs of that section contain are fulfilled. Section 229 rests in part upon par. (i.) of s. 51 of the Constitution and in part upon par. (ii.) of s. 51 of the Constitution. For example, par. (a) of s. 229 makes forfeit all goods which are smuggled or unlawfully imported, exported or conveyed. Smuggling is an offence under provisions which are for the protection of the duties, and may therefore be referred to the power with respect to taxation. The words "unlawfully imported" include the importation of imports which are absolutely prohibited irrespective of their dutiable character, and it may therefore be referred to par. (i.) of s. 51 of the Constitution, that is to say the power over trade and commerce with other countries and among the States.

The authority of the Commonwealth Government to impose forfeitures may be said to arise directly from the respective powers to which I have referred as a matter fairly within the scope of the substantive power to deal with, on the one hand, Customs duties, and, on the other, importation under the commerce power. But another view of the matter is to treat the power to impose a forfeiture in the case of offences as something which is incidental to the main power. There has in this Court been some discussion as to the use of par. (xxxix.) of s. 51 in cases where the extent of the subject matter of a substantive power of the Commonwealth is involved, and the question is whether a provision in a statute may be supported as directed to carrying out the main power by providing for a matter incidental to the subject matter. The view which I personally have expressed is that everything which is incidental to the main purpose of a power is contained within the power itself so that it extends to matters which are necessary for the reasonable fulfilment of the legislative power over the subject matter in accordance with the maxim *quando lex aliquid alicui concedit, concedere et illud videtur sine quo res ipsa valere non potest*. But it has appeared to me that par. (xxxix.) of s. 51 is related not so much

H. C. OF A.

1952.

BURTON

v.

HONAN.

Dixon C.J.

H. C. OF A.
1952.
BURTON
v.
HONAN.
Dixon C.J.

to matters incidental to the subjects placed under the legislative power of the Commonwealth but rather to matters which arise in the execution of the various powers reposed in the Legislature, the Judiciary and the Executive. But the distinction is for present purposes immaterial because it produces the same result, namely, that the Parliament may in the exercise of any of the substantive powers given by s. 51 make all laws which are directed to the end of those powers and which are reasonably incidental to their complete fulfilment.

In the present case the question at issue depends upon the operation of the forfeiture and seizure provisions (ss. 229 and 203 of the *Customs Act*) and the operation of s. 262.

The operation of the power of forfeiture is not restrained either in point of person or, except in a qualified manner, in point of time. It is said that goods which might be forfeited under the words of the provision to which I have referred are exposed to forfeiture notwithstanding that they go into home consumption and are released from the control of the Customs for that purpose, and that they may be found in the hands of persons who have dealt with them quite honestly and have acquired apparent title to them as the last of a line of successive people all dealing in perfect bona fides and for value.

As to s. 262, it is said that a forfeiture may result, from the operation of that section, of goods which are in the hands of a person who has obtained them innocently after they have gone into home consumption, and that by the conviction of the offender who imported them unlawfully into the country the innocent purchaser is left with no right to contest the legality of the forfeiture but has lost his goods in consequence of a proceeding to which he is not a party.

The preliminary question with which we are concerned is whether those two features of the operation of the provisions drive it beyond the application of the incidental power. On that subject, which is one of degree, we have had the advantage of a discussion on both sides, which has drawn our attention to the material considerations. On one side it is pointed out that injustice may occur to individuals who are innocent, and that they may be involved in the loss of property for which they can only have a recompense by recourse to the person who has sold it, who may, of course, not be able to restore the purchase money. On the other side it is pointed out that in the history of English and Australian Customs legislation forfeiture provisions are common, drastic and far-reaching, and that they have been considered a necessary measure to vindicate

the right of the Crown and to ensure the strict and complete observance of the Customs laws, which are notoriously difficult of complete enforcement in the absence of strong provisions supporting their administration. These matters of incidental powers are largely questions of degree, but in considering them we must not lose sight of the fact that once the subject matter is fairly within the province of the Federal legislature the justice and wisdom of the provisions which it makes in the exercise of its powers over the subject matter are matters entirely for the Legislature and not for the Judiciary.

In the administration of the judicial power in relation to the Constitution there are points at which matters of degree seem sometimes to bring forth arguments in relation to justice, fairness, morality and propriety, but those are not matters for the judiciary to decide upon. The reason why this appears to be so is simply because a reasonable connection between the law which is challenged and the subject of the power under which the legislature purported to enact it must be shown before the law can be sustained under the incidental power.

In the present case it appears to us that these are Customs provisions which are of a standard pattern, with the possible exception of s. 262, and that they would all be regarded as fairly and reasonably representing laws in relation to Customs and matters arising thereout, and that is so whether they are regarded as under the trade and commerce power or under the taxation power. As I have explained, they are in part referable to the one and in part referable to the other, and in some cases referable indifferently to both. Section 262 is, however, a provision, which, according to the passage cited from Dr. *Wollaston's* book, was new in the Customs legislation of 1901. Its purpose is to make the conviction of the offender decisive on all matters of fact upon which the forfeiture of the goods depends. In the absence of that provision, if there was a contest as to the occurrence of the matters of fact upon which the forfeiture depended, it would be necessary to have the issue of fact decided, either in a proceeding which results from s. 207 of the Act or in an independent action for trespass brought by the supposed owner of the goods against a Customs authority in which he asserted that the seizure was unlawful. Such a proceeding would, of course, meet with difficulties if the officers pleaded the provisions of the Act which protect them in the case of a bona-fide exercise of their powers on reasonable grounds (cf. s. 220).

Section 262 takes a course which brings such an issue speedily to a final conclusion. So far as the powers to make laws on matters incidental to trade and commerce, or to taxation, are concerned,

H. C. OF A.
1952.

BURTON

v.
HONAN.

Dixon C.J.