27/75

HIGH COURT OF AUSTRALIA

MILICEVIC v CAMPBELL

McTiernan ACJ, Gibbs, Mason and Jacobs JJ

13 June 1975
[1975] HCA 20; (1975) 132 CLR 307; (1975) 6 ALR 1; (1975) 49 ALJR 195

CONSTITUTIONAL LAW (CTH) – CUSTOMS AND EXCISE – PROHIBITED GOODS – POSSESSION OF GOODS REASONABLY SUSPECTED OF HAVING BEEN IMPORTED INTO AUSTRALIA IN CONTRAVENTION OF *CUSTOMS ACT* MADE AN OFFENCE – VALIDITY: *CUSTOMS ACT* 1901-1971(CTH), S233B(1) (CA), (1B); *THE CONSTITUTION* (63 & 64 VICT. C12), S51(I.), (XXXIX.).

CUSTOMS – OFFENCE – POSSESSION OF PROHIBITED GOODS REASONABLY SUSPECTED OF HAVING BEEN IMPORTED INTO AUSTRALIA IN CONTRAVENTION OF *CUSTOMS ACT* – PROHIBITED GOODS – WHETHER RESTRICTED TO GOODS & WHICH HAVE BEEN IMPORTED: *CUSTOMS ACT* 1901-1971 (CTH), S233B(1)(ca), (1B).

The plaintiff, who had been committed for trial on a charge that he committed an offence against s233B(1)(ca) of the *Customs Act* 1901-1971 (Cth) sought a declaration that the provisions of para. (ca) are invalid and unconstitutional.

Section 233B(1) provides
"Any person who ...
(ca) without reasonable excuse (proof whereof shall be upon him) has in his possession any prohibited imports to which this section applies which are reasonably suspected of having been imported into Australia in contravention of this Act, ...
shall be guilty of an offence."

Section 233(1B) provided as a defence for the defendant to prove "that the goods were not imported into Australia in contravention of this Act."

The Commonwealth Parliament has power to make laws with respect to "trade and commerce with other countries" ... (s51(1) of the *Constitution*. That power includes the prohibition of importation of goods from other countries.

The plaintiff argued that s233B(1)(ca) refers to goods which need not in truth have been imported and in this way goes beyond the power to legislate to prohibit the impartation of goods.

HELD: The provision was a valid law of the Commonwealth.
Per McTiernan ACJ: Para (ca) does not apply to goods which were not in fact imported into Australia or not imported into Australia in contravention of the Act and therefore unnecessary to rely on the case of *Williamson v Ah On* [1926] HCA 46; (1926) 39 CLR 95; 33 ALR 13.

Gibbs, Mason and Jacobs JJ: "Prohibited imports" refers to goods whose importation has been prohibited under s50 whether or not they have been imported.

(2) Section 233B(1)(ca) does not apply to goods which in fact were not imported, for if it is proved that the goods were not imported, no offence is proved.

(3) Section 233E(1B) is an evidentiary provision and does no more than regulate the burden of proof, and following *Williamson v Ah On*, *supra*, s233B(1)(ca) and s233B(1B) were valid.

Mason & Jacobs expressed opinions that s233B(1)(ca) was valid even without s233B(1B).
Gibbs J was inclined to the view that s233B(1)(ca) was invalid but for s233B(1B).
Jacobs J left the question open as to whether the suspicion may be required to exist in the mind of some person at the time when the possession charged was alleged to have occurred or to exist in the mind of the Court before whom the alleged offender was brought.
Mason J stated: "The suspicion is not entirely subjective; a court must be satisfied that it is reasonable and in this respect the reasonableness of the suspicion is the subject of judicial determination."
Gibbs J: "It is enough that the prohibited imports were suspected, on reasonable grounds, of having been imported. We were asked to express our opinion on the question whether, as was held by the Full Court of the Supreme Court of Victoria in *R v Van Swol* ([1975] VicRp 5; [1975] VR 61; (1974)

4 ALR 386; (1974) 27 FLR 353; MC 31/74), it is right to say that the suspicion need not have been entertained at the same time as the goods were in the possession of the accused. ... However ... it is irrelevant.... whether *R v Van Swol* was correctly decided; it would therefore not be right to consider that question."

The following written judgments were delivered:-

McTIERNAN ACJ:

1. This is a reference under s18 of the *Judiciary Act*

2. The question discussed in the argument on the reference was whether s233B(1)(ca) of the *Customs Act* 1901-1971 is a valid law of the Commonwealth. The discussion centred upon the words "which are reasonably suspected of having been imported into Australia in contravention of this Act".

3. Section 51(i.) of the *Constitution* is the source of the Commonwealth power to prohibit the importation of goods into Australia. The words "prohibited imports" in s233B mean narcotic goods the importation of which into Australia is prohibited under s50 of the Act. The description "prohibited imports" is to be found in s51 of the Act.

4. It is a valid exercise of the legislative power incidental to the power granted by s51(i.) to make the possession in Australia without reasonable excuse of narcotic goods an offence punishable under the *Customs Act* 1901-1971. That clearly is an appropriate means of excluding narcotic substances, as defined in s4 of the *Customs Act* 1901-1971 (as amended by the *Customs Act* (No. 2) 1971), from the channels of trade and commerce with other countries.

5. Section 233B(1)(c) differs from s233B(1)(ca) only in that the offence under the former provision is to be in possession of narcotic goods in the category of prohibited imports, "which have been imported into Australia in contravention of this Act". I think that there is no objection to the constitutionality of that provision. Did the parliament overstep the limit of power granted by s51 (i.) of the *Constitution* by inserting par. (ca) in s233B (1), having regard to the difference between the wording of that paragraph and that of par. (c)? It seems to me that the insertion of par. (ca) in s233B (1) was consequential upon the wide extension of the category of narcotic substances to which s233B would apply after the commencement of the *Customs Act (No. 2)* 1971. For in the long list of narcotic substances enumerated in the VIth sch. to the *Customs Act* 1901-1971, inserted by s9 of the *Customs Act (No. 2)* 1971, there may be a substance in the possession of a person for which he has no reasonable excuse and which is reasonably suspected of having been imported into Australia. Paragraph (c) would not be applicable to such a person. Paragraph (ca) would be applicable to him. I do not think that the words "which are reasonably suspected of having been imported into Australia" cause s233B(1)(ca) to exceed the power of the Commonwealth under s51(i.) of the *Constitution*. This power is plenary in its quality. It enables the parliament to make a law prohibiting the importation of goods and to enact a law imposing a penalty for any infringement of the law.

6. The words of par. (ca) provide no ground for the supposition that the application of the words "which are reasonably suspected of having been imported into Australia" are intended to apply to goods which were not in fact imported into Australia or not imported into Australia in contravention of the Act. This is evident from s233B(1B) — a provision inserted in the Act by s7 of the *Customs Act (No. 2)* 1971. This section also inserted par. (ca) in s233B(1).

7. Dixon CJ in giving the judgment of the Court in *Burton v Honan* said [1952] HCA 30; (1952) 86 CLR 169, at p79; [1952] ALR 553:

> "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."

8. In my opinion there is a reasonable connexion between s233B(1)(ca) and the subject matter of s51(i.) of the *Constitution* which, of course, includes importation.

9. As regards the case of *Williamson v Ah On* [1926] HCA 46; (1926) 39 CLR 95; 33 ALR 13, I do not think it is necessary to rely upon the decision in that case to support the constitutionality of s233B(1)(ca) (at p311)

10. I would answer the question in the case stated in the affirmative.

GIBBS J: The plaintiff, who has been committed for trial at the Court of Quarter Sessions of New South Wales on a charge that he committed an offence against s233B(1)(ca) of the *Customs Act* 1901-1971 (Cth) ("the Act"), has commenced an action in this Court claiming a declaration that the provisions of that paragraph of the sub-section are invalid and unconstitutional. The sole question for decision on this case stated is whether s233B(1)(ca) is a valid law of the Commonwealth.

2. Section 233B(1)(ca) is one of a number of provisions inserted in the Act by the *Customs Act* (No. 2) 1971. Section 233B(1) of the Act, as amended, provides (*inter alia*) as follows:

> "Any person who—
> . . .
> (ca) without reasonable excuse (proof whereof shall lie upon him) has in his possession any prohibited imports to which this section applies which are reasonably suspected of having been imported into Australia in contravention of this Act; . . .
> shall be guilty of an offence."

3. Section 233B(1B) and s233B(2), which were also inserted in the Act by the *Customs Act* (No. 2) 1971, read as follows:

> "(1B) On the prosecution of a person for an offence against sub-section (1) of this section, being an offence to which paragraph (ca) of that sub-section applies, it is a defence if the person proves that the goods were not imported into Australia or were not imported into Australia in contravention of this Act."
>
> "(2) The prohibited imports to which this section applies are prohibited imports that are narcotic goods . . . "

The words "narcotic goods" are defined by s4 of the Act but nothing turns on their meaning. It is, however, necessary to determine the meaning of the words "prohibited imports" in s233B(1)(ca) . By s50(1) of the Act power is given to the Governor-General by regulation to prohibit the importation of goods into Australia. The power may be exercised by prohibiting the importation of goods absolutely, by prohibiting the importation of goods from a specified place or by prohibiting the importation of goods unless specified conditions or restrictions are complied with (s50 (3) (a)). The powers given by this section have been exercised by making the Customs (Prohibited Imports) Regulations. Section 51 of the Act provides: "Goods, the importation of which is prohibited under the last preceding section, are prohibited imports." The expression "prohibited imports" is used in a number of other provisions of the Act: see ss210 (1), 228 (1), 229 (b), 231, 233 and 233B. As will be shown later, some of these provisions are of some relevance in determining the meaning of the words "prohibited imports" where they appear in s233B(1)(ca). It is convenient at this stage to set out certain of these provisions:

> "229. The following goods shall be forfeited to His Majesty:
> . . .
> (b) all prohibited imports."
>
> "231. (1) All persons to the number of two or more assembled for the purpose of—
> (a) importing prohibited imports; or
> . . .
> (c) preventing the seizure, or rescuing after seizure, of any prohibited imports or smuggled goods,
> shall be guilty of an offence . . . "
>
> "233. (1) No person shall—
> . . .
> (b) import any prohibited imports; or

. . .
(d) unlawfully convey or have in his possession any smuggled goods or prohibited imports or prohibited exports."

"233. (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."

"233B. (1) Any person who—
(a) without any reasonable excuse (proof whereof shall lie upon him) has in his possession, on board any ship or aircraft, any prohibited imports to which this section applies, or (b) imports, or attempts to import, into Australia any prohibited imports to which this section applies, or (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, or
. . .
shall be guilty of an offence."

"233B. (1A) On the prosecution of a person for an offence against the last preceding sub-section; being an offence to which paragraph (c) of that sub-section applies, it is not necessary for the prosecution to prove that the person knew that the goods in his possession had been imported into Australia in contravention of this Act, but it is a defence if the person proves that he did not know that the goods in his possession had been imported into Australia in contravention of this Act."

4. The Commonwealth Parliament has power to make laws with respect to "trade and commerce with other countries ..." (s51(i) of the *Constitution*). That power clearly authorizes the Parliament to prohibit the importation of goods from other countries (*Baxter v Ah Way* [1909] HCA 30; (1909) 8 CLR 626; 15 ALR 603; *Radio Corporation Pty Limited v The Commonwealth* [1938] HCA 9; (1938) 59 CLR 170; [1938] ALR 146). To render any such prohibition effective the Parliament may validly legislate to render unlawful the possession of goods which have been imported in contravention of the prohibition (*Irving (Collector of Customs for Queensland) v Jengora Nishimura* [1907] HCA 50; (1907) 5 CLR 233, at pp236-237, 238; 14 ALR 203; *Hill v Donohoe* [1911] HCA 38; (1911) 13 CLR 224, at p227) and to provide for the forfeiture of goods so imported (*Burton v Honan* [1952] HCA 30; (1952) 86 CLR 169; [1952] ALR 553). It is unnecessary to discuss whether such legislation can be enacted under s51(i) alone or whether it also needs the support of the incidental power given by s51(xxxix.). The power to make laws with respect to taxation (s51(ii.)), under which legislation for these purposes may be enacted in so far as the protection of the revenue is involved, does not extend to s233B, which has nothing to do with taxation. Some remarks in *Hill v Donohoe* [1911] HCA 38; (1911) 13 CLR 224 raise the question whether the statement that the parliament has power to make it unlawful to have possession of goods that have been unlawfully imported requires some qualification to render it correct. In that case it was held that knowledge is an element of the offence created by s233B (1)(c) – a situation since altered by the addition of sub-s(1A) to s233B – but the court (1911) 13 CLR, at p227 left open the question whether parliament could validly legislate to make it an offence for a person to have in his possession prohibited goods which in fact had been imported, if he was ignorant of that fact. It is, however, difficult to see any reason in principle why the power should not extend to such a case. The fact that the statute may expose to punishment a person who was unaware that the goods in his possession had been imported would seem to go rather to the justice of the provision than to the question whether it was within the power. In *Poole v Wah Min Chan* [1947] HCA 37; (1947) 75 CLR 218; [1947] ALR 505 it was held that s233(1)(d) upon its proper construction did not make knowledge of the unlawful importation an element of the offence which it created, and the court assumed (although it did not expressly hold) that the section so construed was valid. Further, in *Burton v Honan* [1952] HCA 30; [1952] HCA 30; (1952) 86 CLR 169 the court held valid a provision which brought about the forfeiture of goods unlawfully imported even though they had passed into the hands of an innocent purchaser. The fact that under s233B(1)(ca) it is not necessary for the prosecution to prove that the accused knew or himself suspected that the goods were unlawfully imported is therefore no objection to its validity.

5. The argument on behalf of the plaintiff is that the power of the parliament to enact legislation similar to s233B(1)(ca) is attracted only if the goods have in fact been imported, "Nothing can be prohibited but what are in truth imports and imports are necessarily a subject of the power given by s51(i.)": *Australian Communist Party v The Commonwealth* per Dixon J [1951] HCA 5; (1951) 83 CLR 1, at p189; [1951] ALR 129. It is then submitted that s233B(1)(ca) legislates with respect to goods which although reasonably suspected of having been imported need not in truth have

been imported and in this way goes beyond power.

6. The foundation of the argument for the plaintiff was that s233B(1)(ca) upon its proper construction does not make it an element of the offence which it creates that the goods the subject of the charge have been imported. To prove an offence against that section it is necessary to show that the accused had in his possession "prohibited imports". However, those words do not connote that the goods to which they refer have in fact been imported. They are given by s51 the special meaning of goods whose importation is prohibited under s50. They are goods which have been "put in a class tabooed", as Griffith CJ said in *Hill v Donohoe* (1911) 13 CLR at p226 and it is made unlawful to import goods of that class (see ss233(1)(b) and 233B(1)(b)) but the goods answer the description of "prohibited imports" whether they have been imported or not. The decision of this Court in *R v Bull* [1974] HCA 23; (1974) 131 CLR 203; (1974) 3 ALR 171; (1974) 48 ALJR 232 established, although not without dissent, that goods can be "prohibited imports" within ss231(1)(c) and 233B(1)(a) although they have not been imported (1974) 131 CLR, at pp222-223, 242-243, 249-250, 253, 267, 273. Similarly, in s231(1)(a) the words "prohibited imports" must have the meaning defined by s51 because it would not be sensible to refer to persons assembled for the purpose of importing goods which had already been imported. It is true that there are some sections of the Act – particularly, ss229 (b), 233(1)(d) and 233(2) – that would appear to be beyond power if the "prohibited imports" to which they refer have not in fact been imported into Australia, and it may be necessary, in order to render those provisions valid, to understand them as referring only to prohibited imports that have in fact been imported – cf. *Irving (Collector of Customs for Queensland) v Jengora Nishimura* [1907] HCA 50; (1907) 5 CLR 233 at pp236-237, 238; 14 ALR 203. However, in the case of s233B(1)(ca) it is clear that the words "prohibited imports" simply refer to goods whose importation has been prohibited under s50 whether or not they have been imported. If it were necessary for the prosecution to establish that the prohibited imports had in fact been imported, the description of the goods as reasonably suspected of having been imported in contravention of the Act would be surplusage, and the provisions of s233B(1B) would be quite unnecessary.

7. It is therefore not necessary for the prosecution to establish that the prohibited imports the subject of the charge have in fact been imported into Australia. It is enough that the prohibited imports were suspected, on reasonable grounds, of having been imported. We were asked to express our opinion on the question whether, as was held by the Full Court of the Supreme Court of Victoria in *R v Van Swol* [1975] VicRp 5; (1975) VR 61, it is right to say that the suspicion need not have been entertained at the same time as the goods were in the possession of the accused. However, the basis of the plaintiff's argument in the present case is that by enacting s233B(1)(ca) the parliament has legislated with respect to goods which have not in fact been imported and it is irrelevant to that argument whether *R v Van Swol* was correctly decided; it would therefore not be right to consider that question.

8. It is possible that a suspicion, although based on reasonable grounds, may in truth be mistaken. It is therefore apparent that the provisions of s233B(1)(ca), if unqualified, would embrace within their scope goods which had not been imported into Australia. I incline to the view that the fact that this paragraph of the sub-section could only apply to goods suspected on reasonable grounds of having been imported would not make it a law with respect to trade and commerce with other countries, or with respect to any matter incidental to the execution of a power vested in the parliament, and that the provisions of s233B(1)(ca), if read alone, would go beyond the powers of the parliament. However, s233B(1)(ca) cannot be read alone; the effect of its provisions is limited by those of s233B(1B). When the two sub-sections are read together it is seen that s233B(1)(ca) creates no offence if it is proved that the goods were not imported or were not imported in contravention of the Act. What the parliament has done is to render it unnecessary for the prosecution to prove anything more than that the prohibited imports (being narcotic goods) in the possession of the accused were reasonably suspected of having been imported into Australia in contravention of the Act, and once that has been proved the accused person, in order to escape conviction, must establish (if he does not rely on reasonable excuse) that the goods were not imported or were not imported in contravention of the Act. If at the conclusion of all the evidence it appears that the goods were not imported no offence is committed.

9. The parliament may, when legislating with respect to a subject within the ambit of its powers, validly enact laws prescribing the rules of evidence and procedure to be observed in any legal

proceedings, whether criminal or civil, arising in relation to that subject matter and may in particular cast the onus of proof upon either party to those proceedings: *Williamson v Ah On* [1926] HCA 46; (1926) 39 CLR 95, at pp108 *et seq*, 126-127, 127-129; or at pp101-102, 122-123; 33 ALR 13; *Orient Steam Navigation Co Ltd v Gleeson* [1931] HCA 2; (1931) 44 CLR 254, at pp259-260, 262-263, 264; 37 ALR 61; and see also *The Commonwealth v Melbourne Harbour Trust Commissioners* [1922] HCA 31; (1922) 31 CLR 1, at p12; 28 ALR 325. Of course, the parliament may not, by enacting legislation which purports to be merely procedural, extend the operation of its laws to subjects beyond its power; it cannot, in other words, expand the boundaries of its powers by its own enactments. For example, it could not validly provide that goods which had in fact originated in Australia should be deemed to have been imported, and that the customs legislation should accordingly apply to them. However, s233B(1)(ca), read in the light of s233B (1B), applies only to goods which have been imported into Australia, although the burden of proving that the goods were not imported lies on the person charged with the offence. Section 233B (1B) is an enactment of an evidentiary kind, and does no more than regulate the burden of proof, notwithstanding that if the fact in issue – that the goods were not imported – is established the person accused will have done nothing that could have been rendered unlawful by any enactment of the parliament. Section 233B(1)(ca) does not invalidly purport to apply to goods which in fact were not imported, for if it is proved, in the manner prescribed, that the goods were not imported, no offence is committed. The decision of this Court in *Williamson v Ah On* [1926] HCA 46; [1926] HCA 46; (1926) 39 CLR 95; 33 ALR 13 is in my judgment a very clear authority in favour of the validity of s233B(1)(ca) and s233B(1B). In that case the provisions of the *Immigration Act* (Cth) held to be validly made under s51 (xxvii.) and (xxxix.) of the *Constitution* operated in two ways now relevant – they placed on a person charged with being a prohibited immigrant the burden of proving that he was not an immigrant, and provided that the burden of proof should not be discharged unless (subject to an immaterial exception) the defendant in his personal evidence truly stated the name of the vessel by which he travelled to Australia and the date and place of his arrival. The provisions now under consideration do not go so far – they place the burden of proof on the person accused, but impose no limitation on the way in which the burden may be discharged. If *Williamson v Ah On* was correctly decided, ss233B (1)(ca) and 233B(1B) should with stronger reason be held to be valid.

10. We were asked, if necessary, to overrule *Williamson v Ah On*, and our attention was drawn to the criticism made of that decision by Dr Wynes in his *Legislative, Executive and Judicial Powers in Australia*, 4th ed. (1970), pp124-125. That criticism, in part at least, is based on those provisions of the *Immigration Act* (Cth) which restricted the mode of proof. Dr Wynes said (at p125):

> "It is true that Parliament may regulate the burden of proof; but it is another thing to say that proof of facts which go to the root of the existence of federal power shall be given only in a certain way and that, no matter how strong the evidence may be, no matter how unmistakably and clearly it may be shewn that the person charged does not come within the area of legitimate Commonwealth power yet he shall be treated as coming within it."

In the present case it is unnecessary to consider that aspect of the matter, since the legislation now in question has no similar features. However, I can see no reason to depart from the conclusion of the majority in that case that it was not invalid to place upon the person charged the burden of proving that he was not an immigrant. The decision is authority for the proposition that, speaking generally, the parliament may validly place upon an accused person the burden of proving any fact in issue, even a fact that when established shows not only that the law does not apply to the case but that it could not validly have been applied.

11. For these reasons I hold that the provisions of s233B(1)(ca), read as they must be in conjunction with the provisions of s233B(1B), are a valid law of the Commonwealth. I would answer the question asked in the case stated accordingly.

MASON J: Is s233B(1)(ca) of the *Customs Act* 1901-1971 (Cth) a valid law of the Commonwealth? This is the question raised by the stated case.

2. The sub-section makes it an offence for a person without reasonable excuse (proof of which lies on him) to have in his possession prohibited imports being narcotic goods which are reasonably suspected of having been imported into Australia in contravention of the Act. The expression "prohibited imports" may mean goods the importation of which has been prohibited or it may

mean goods the importation of which has been prohibited and which have actually been imported contrary to the Act (see ss50 and 51; *R v Bull* [1974] HCA 23; (1974) 131 CLR 203; (1974) 3 ALR 171; (1974) 48 ALJR 232). However, in the context of s233B(1)(ca), whatever it may mean elsewhere, the expression cannot be read so as to signify goods which have actually been imported in contravention of the statute. The offence is that of having in possession goods of the specified kind which are reasonably suspected of having been illegally imported into Australia. To give "prohibited imports" the alternative meaning would deprive the words "which are reasonably suspected" of any operation and would leave no scope for the first of the two defences for which explicit provision is made by s233B(1B) viz., that the goods were not imported into Australia. Moreover, so to read the expression would be to create an offence which adds little or nothing to the offence already created by s233B (1)(c) and thereby give little or no effect to an amendment which was, so it seems, designed to travel beyond the limitations attaching to s233B(1)(c).

3. The plaintiff's case is that when s233B (1)(ca) is construed in this fashion it is invalid because it makes it an offence for a person to have in his possession goods which in truth have not been imported if the defendant is unable to discharge the onus of proof which rests upon him of establishing the defence that the goods were not so imported. The power conferred by s51(i), so it is argued, is limited to goods which "are in truth imports" (*Australian Communist Party v The Commonwealth* [1951] HCA 5; (1951) 83 CLR 1, at p189; [1951] ALR 129).

4. The plaintiff's argument does not deny that for purposes of constitutional validity the ascertainment of the character of goods as imports is to be made by a judicial finding or determination; it is not a character which goods have absolutely or apart from such a finding or determination. It is conceded, as I understand the argument, that if the sub-section required the prosecution to prove importation as an element in the offence the issue of constitutional validity would vanish. The specific and narrow point of the submission then is that the reversal of the onus of proof takes the provision outside the limits of constitutional power.

5. Traditionally the onus of proof is an element in the judicial determination of a fact. Ordinarily the onus rests with the party alleging the existence of the fact, but this circumstance supplies no reason for saying that when the scope of a legislative power does not extend beyond a certain fact, the power does not authorize a provision casting the onus of proof on the party who seeks to deny the existence of this fact. Then a law which makes it an offence for a person to have in his possession narcotics imported into Australia does not cease to be a law with respect to trade and commerce with other countries merely because it contains a provision casting upon the defendant the onus of proving that the goods were not so imported. The provision, though procedural in character, is a law with respect to trade and commerce with other countries; as much so, indeed, as would be a provision which explicitly casts the onus of proof on the prosecution. Section 233B(1)(ca) is, of course, somewhat differently expressed, having regard to the construction which I have given to the words "prohibited imports", but in the result there is no relevant difference for by s223B(1B) provision is made for the defence that the goods are not imports.

6. What I have said is supported by the majority decision of this Court in *Williamson v Ah On* [1926] HCA 46; (1926) 39 CLR 95; 33 ALR 13. With reference to that case Evatt J indicated in *R v Hush; Ex parte Devanny* [1932] HCA 64; (1932) 48 CLR 487, at p512, that the very nature of the subject matter of the legislative power may warrant an enactment which places upon a person suspected of being an immigrant the burden of showing by evidence that he is not. The same observation may fairly be made in connexion with the power conferred by s51(i.) and the importation of goods.

7. Subsequently in *Orient Steam Navigation Co Ltd v* Gleeson [1931] HCA 2; (1931) 44 CLR 254; 37 ALR 61, the court, following *Williamson v Ah On* [1926] HCA 46; (1926) 39 CLR 95; 33 ALR 13 held that the immigration power authorized s3(k) of the *Immigration Act* 1901-1925 which until the contrary was proved deemed certain persons to be prohibited immigrants who had entered Australia contrary to the Act. Dixon J, after stating that the sub-section was confined to proof in legal proceedings of the character of "prohibited immigrant" and the fact of unlawful entry, said (1931) 44 CLR, at pp262-263:

> "Upon such matters, falling as they do within the subject over which the Commonwealth has power, the Parliament may place the burden of proof upon either party to proceedings in a Court of law. The

onus of proof is a mere matter of procedure. If the Parliament may place the burden of proof upon the defendant, it may do so upon any contingency which it chooses to select."

8. Neither s233B(1)(ca) nor s233B(1B) places any restriction on the nature of the evidence by which a defendant may discharge the onus of proof which rests upon him by virtue of the latter provision. There is therefore no scope here for the view expressed by Dr Anstey Wynes in his *Legislative, Executive and Judicial Powers in Australia*, 4th ed. (1970), pp124-125, that a provision qualifying the permission given to a defendant to negative the existence of a critical fact by limiting the class of evidence to be adduced would exceed the limits of constitutional power.

9. For these reasons I would answer the question asked in the affirmative.

10. In so saying I would not wish it to be thought that it is my opinion that s233B(1)(ca) would be invalid but for the presence of s233B(1B). It might be said that s233B(1)(ca) is a provision which is, when regard is had to the importance of enforcing prohibitions prescribed against the importation of narcotic goods and the notorious difficulty of establishing the origin of particular goods, ancillary and incidental to importation of goods, a subject which is part of trade and commerce with other countries. The effective enforcement of prohibitions against the importation of narcotic goods may well be assisted by such a measure and if it so appears then it may well be that Parliament in the exercise of the power conferred by s51(i.) can select it as an appropriate means of enforcing those prohibitions. The existence of a reasonable suspicion that goods have been imported may constitute a sufficient nexus with the subject matter to bring it within power. The suspicion is not entirely subjective; a court must be satisfied that it is reasonable and in this respect the reasonableness of the suspicion is the subject of judicial determination. However, the question is not one on which a concluded opinion needs to be expressed at this time.

JACOBS J: On 9th April 1973 the plaintiff commenced an action claiming a declaration that s233B(1)(ca) of the *Customs Act* 1901-1971 (Cth) was invalid. He had earlier been charged with an offence against s233B(1)(ca) and had been committed for trial at the Court of Quarter Sessions at Sydney. Pursuant to s18 of the *Judiciary Act* 1903-1969 (Cth) and O35, r2 of the *High Court Rules*, the following question of law has been directed to be argued before a Full Court, namely, whether s233B(1)(ca) is a valid law of the Commonwealth.

2. Section 233B(1)(ca) is as follows: (1) Any person who — (ca) without reasonable excuse (proof whereof shall lie upon him) has in his possession any prohibited imports to which this section applies which are reasonably suspected of having been imported into Australia in contravention of this Act . . . shall be guilty of an offence. The prohibited imports to which the section applies are narcotic goods (sub-s (2)).

3. By s50(1) the Governor-General may, by regulation, prohibit the importation of goods into Australia. By s51, goods, the importation of which is prohibited under s50, are prohibited imports. If in par. (ca) the words "prohibited imports" mean not goods of the kind the importation of which has been prohibited but goods which are of that kind and which have actually been imported then the paragraph is valid irrespective of whether the onus of proof of import lies on the prosecutor or the defendant: cf. *Williamson v Ah On* [1926] HCA 46; (1926) 39 CLR 95; 33 ALR 13.

4. The question of substance sought to be argued only arises if in the context of s233B the words "prohibited imports" mean goods of a kind the importation of which has been prohibited. Then the offence is without reasonable excuse having in possession any goods of that kind which are reasonably suspected of having been imported into Australia in contravention of the Act. In my opinion the Commonwealth Parliament can validly create such an offence. It is true that if the words of s233B(1)(ca) are looked at without regard to subs (1B) an offence may thereby be created in respect of goods which are in fact but not in proven fact indigenous to this country. But I do not think that thereby the legislature has exceeded its power. Importation is a part of trade and commerce with overseas countries. It appears to me that the purpose and effect of the paragraph is to deal with one aspect of that subject matter. It is a provision which is recognizably ancillary to the matter of importation. It gives practical effect in one important respect to the purpose of prohibiting the import of goods of the prohibited kind, namely, the prevention of the presence of such prohibited imports in Australia. A reasonable suspicion of import or of import in contravention of the Act may be all that can be established. That suspicion may be required to exist in the

mind of some person at the time when the possession charged is alleged to have occurred or to exist in the mind of the court before whom the alleged offender is brought, depending on the true construction of the paragraph. But on either construction the reasonableness of the suspicion is a justifiable question. It is not the mere presence of the goods in Australia which is made the basis of the offence. It is the presence of those goods when they have the quality that they are reasonably suspected of having been imported in contravention of the Act. In my view such a provision must be regarded as a control in aid of the power to prohibit imports and effectively to forbid the presence or use in this country of imported goods, the importation of which is prohibited. Control provisions of like purpose may be found in other sections of the *Customs Act*. See, e.g., ss196, 197, 203 and 210(1).

5. The contrary view would appear to me to place undue emphasis on the act of importation as though it were the limit of the purpose which may properly be effected by the power. Such a limitation, by isolating the act of importation, overlooks power to legislate not only in respect of the act, but also in respect of the consequence, the presence of imports in the Australian community. The control of the presence of such imports in the community is part and parcel of the concept of the trade and commerce with other countries which leads to that presence. It is open to the legislature to take the view, as it has done, that the presence of such imports in the Australian community can only be effectively controlled by extending the offence of possession not only to goods which are proved actually to have been imported but also to goods which are reasonably suspected of having been imported. It would indeed be strange if power to legislate in the latter case lay within the power of the States unaffected by any expression of a Commonwealth legislative intent to cover the whole field of importation of goods into Australia; yet such is a consequence of a view contrary to that which I have expressed.

6. But importation as part of trade and commerce with other countries remains the source of the power and therefore it is probable that even without such a provision as sub-s(1B) proof of an indigenous origin of the goods would take the impugned possession out of the ambit of par. (ca) and could be raised by a defendant upon a plea that the paragraph could not validly apply to him in the circumstances of the case. But it is not necessary so to determine because there is express provision in sub-s(1B) whereby proof by a defendant that the goods were not imported into Australia or were not so imported in contravention of the Act is made a defence.

7. In my opinion the question asked in the stated case should be answered "Yes".
