

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Petition of William Howe Irving, the Collector of Customs for Queensland, for the dismissal of the Appeal of The Colonial Sugar Refining Company, Limited, v. William Howe Irving, from the Supreme Court of Queensland; delivered the 17th May 1905.*

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Present at the Hearing:

LORD MACNAGHTEN.

LORD DAVEY.

LORD ROBERTSON.

LORD LINDLEY.

SIR FORD NORTH.

SIR ARTHUR WILSON.

[*Delivered by Lord Macnaghten.*]

This is a petition by the Commonwealth Collector of Customs for Queensland, who is Respondent to an Appeal presented by leave of the Supreme Court of Queensland, asking that the Appeal may be dismissed with costs, on the ground that the right of appeal to His Majesty in Council given by the Order in Council of the 30th of June 1860 under which the leave was granted, has been taken away by the Judiciary Act, 1903, and that the only appeal from a decision of the Supreme Court of Queensland now lies to the High Court of Australia.

By the Commonwealth of Australia Constitution Act, which received the Royal Assent on the 9th of July 1900, Sections 71, 76, and 77, the judicial power of the Commonwealth is vested

in the High Court of Australia, and in such other Federal Courts as the Parliament creates, and in such other Courts as it invests with Federal jurisdiction. In certain specified matters the High Court is invested with original jurisdiction, and Parliament is empowered to confer original jurisdiction in other specified matters, including any matter arising under the Constitution, or involving its interpretation, or arising under any laws made by the Commonwealth Parliament. With respect to all these matters the Parliament is empowered to make laws defining the jurisdiction of any Federal Court other than the High Court, and defining the extent to which the jurisdiction of any Federal Court shall be exclusive of that which belongs to, or is invested in, the Courts of the States, and investing any Court of a State with Federal jurisdiction.

Acting under a Commonwealth Act called the Excise Tariff 1902, the Collector of Customs for Queensland required the Appellants, the Colonial Sugar Refining Company, Limited, to pay 20,100*l.* excise duty in respect of 6,700 tons of sugar. The Appellants disputed the claim. So they deposited the money with the Collector in accordance with the provisions of the Excise Act, 1901, and then brought this action against the Collector to recover the sum deposited. The writ in the action was issued on the 25th of October 1902. Under the Rules of the Supreme Court a special case was stated by the parties for the opinion of the Full Court. The case was set down for argument in July 1903, but it stood over until the September sittings of the Court. On the 4th of September 1903 the Court decided that the Government was entitled to retain the duty, and gave judgment for the Collector with costs. In the meantime the Judiciary Act, 1903, had been passed. It received the Royal Assent

on the 25th of August 1903. By Section 38 the jurisdiction of the High Court in certain specified matters is made exclusive of the jurisdiction of the several Courts of the States, and by Section 39 it is made exclusive in all other matters except as therein provided. Sub-section 2 of Section 39 provides that the several Courts of the States shall be invested with Federal jurisdiction in all the matters above mentioned, except those specified in Section 38, subject to certain conditions and restrictions, one of which is that every decision of a Court of a State from which, at the establishment of the Commonwealth, an Appeal lay to the Queen in Council, shall be final and conclusive except so far as an Appeal may be brought to the High Court.

The Appellants, being dissatisfied with the judgment of the Supreme Court of the 4th of September 1903, applied to the Court for leave to appeal to His Majesty in Council. The application was heard by Cooper, C.J., and Real, J. The learned Judges differed in opinion. The Chief Justice thought that leave ought to be granted. Real, J., was of the contrary opinion. In accordance with the Order in Council of the 30th of June 1860 the opinion of the Chief Justice prevailed, and leave to appeal was accordingly granted.

The case was fully argued before this Board. On behalf of the Appellants it was contended that the provisions of the Judiciary Act, 1903, on which the Respondent relies, assuming them to be within the powers of the Commonwealth Legislature, are not retrospective so as to defeat a right in existence at the time when the Act received the Royal assent.

As regards the general principles applicable to the case there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the

petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the Appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is, was the appeal to His Majesty in Council a right vested in the Appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.

Their Lordships will therefore humbly advise His Majesty that the Petition ought to be dismissed. The Petitioner will pay the costs of the Petition.

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