appeal should be allowed, and judgment should be given for the appellants for the amount of the ten yearly instalments, and for interest on those which became due after the Board became the owner of the land.

BARTON, J. I am of the same opinion, and I see no necessity to add anything.

O'CONNOR, J. I also am of the same opinion.

Appeal allowed with costs. Judgment for appellants for £118 1s. 10d., with costs.

Solicitors for appellants, *Gibbs & Heales*, Melbourne, for *J. W. Power*, Horsham.

Solicitors for respondent, *Guinness*, State Crown Solicitor.

[HIGH COURT OF AUSTRALIA.]

J. M. CHRISTIE . . . . . APPELLANT;
INFORMANT,

AND

PERMEWAN, WRIGHT & CO. LTD. . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF VICTORIA.

Customs Act (*No.* 6 *of* 1901), *secs.* 4, 245, 248, 251—*Customs Prosecution—Procedure in Court of Summary Jurisdiction—Institution of prosecution in name of "Collector"—Justices Act* 1890 (*Victoria*) (*No.* 1105), *secs.* 18, 19.

A customs prosecution for a pecuniary penalty not exceeding £500 must be instituted in the name of the collector for the State.

In a customs prosecution in a Court of Petty Sessions in Victoria the information may be laid by a duly authorized agent of the Collector for Victoria, but must state that the information is in the name and on behalf of such Collector.

APPEAL, by way of order *nisi* to review, from a decision of a Court of Petty Sessions.

H. C. OF A. 1904.

CHRISTIE v. PERMEWAN, WRIGHT & CO. LTD.

At the Court of Petty Sessions at Melbourne on 7th October, 1904, an information was heard which was as follows:

"The information of John Mitchell Christie of the Customs House, Melbourne, in the State of Victoria, who saith that the said Permewan, Wright & Co. Ltd., being the owner of a certain carriage licensed for the carriage of goods subject to the control of the Customs, did on or about the 17th day of October, 1902, at Melbourne, in the said bailiwick and State, move certain goods, to wit a case or package containing dutiable goods marked . . . imported into the Commonwealth by Harrison Brothers & Kettle of Wangaratta, general merchants, *ex* the ship 'Narung' (the said goods then being subject to the control of the Customs) without authority, and not in accordance with the *Customs Act* 1901, contrary to the said Act, and that the said defendant did so move the said goods in manner aforesaid with intent to defraud the revenue contrary to the said Act.

(Signed) J. M. CHRISTIE."

On the hearing Christie, the informant, gave evidence that he was a detective inspector employed in His Majesty's Customs, that it was his duty amongst other things to detect offenders against the *Customs Act* and to lay informations and conduct prosecutions. He also produced authorities in writing signed respectively by the Controller-General of Customs and by the Collector of Customs for the State of Victoria, purporting to appoint him to be Collector for this purpose and to authorize him to prosecute in respect of offences against the *Customs Act*. Objection was taken on behalf of the defendant that the Court had no jurisdiction to hear the information on the ground (*inter alia*) that proceedings could be instituted in Petty Sessions for offences against the *Customs Act* only in the name of the Collector.

Other evidence having been heard, the magistrate who constituted the Court dismissed the information on the merits with costs, stating that he did not think the Crown had established its case.

On the application of the informant, *Griffith*, C.J., granted an order *nisi* returnable before the Full Court to review the decision on the grounds :—

1. That the offence charged against the defendant was proved by uncontroverted evidence;

2. That the evidence given by one Charles Heath on his examination in chief was wrongly admitted.

Starke, for the informant, appellant, moved the order absolute.

Isaacs, K.C., and *Miller*, for the defendant, respondent, showed cause.

A preliminary question was raised as to the practice to be followed on appeal to the High Court by order to review under the Victorian Justices Act.

GRIFFITH, C.J.—This is an appeal under the *Judiciary Act*, and we think the appellant should begin.

Isaacs renewed the objection to the information taken before the magistrate.

The only question argued was whether the prosecution was properly instituted or not.

Starke. A number of the penalties imposed by the *Customs Act*, including that in question here, are not for the protection of the revenue, but for the benefit of the public and as a punishment to the offender. That being so any member of the public may prosecute. The fact that a mode of enforcing the penalty is prescribed by the Act, does not take away the right of a member of the public to enforce it. That right is only taken away if the mode of enforcement is prescribed in the section which imposes the penalty. See *Archbold's Criminal Pleading*, 22nd ed., p. *Sargood* v. *Veale*, 17 V.L.R., 660. The informant was the proper officer to institute this prosecution. He is a "collector" within the meaning of sec. 245 of the *Customs Act*, for by sec. 4 "collector" includes "any officer doing duty in the matter in relation to which the expression is used," and the matter in respect of which the expression is used in sec. 245 is a customs prosecution. Of course the word "doing duty" must mean lawfully doing duty, that is to say the duty must be allotted to the officer by a competent authority. By sec. 248 of the *Customs Act* the procedure of

H. C. OF A. 1904.

CHRISTIE v. PERMEWAN, WRIGHT & CO. LTD.

courts of summary jurisdiction is to apply in customs prosecutions. By sec. 18 of the *Justices Act* 1890 an information must be signed by the informant, and by sec. 19, if it is desired that a warrant for the arrest of the offender should issue, the information must be sworn to by the informant. It would, therefore, be very inconvenient if it was necessary that the Collector for the State should be the informant in every customs prosecution.

Isaacs, K.C. Where the Act which creates an offence also indicates *the* remedy, that is the only remedy. If the Act only indicates *a* remedy, the common law remedy is not excluded. *R.* v. *Lovibond*, 24 L.T.N.S., 357; *Bradlaugh* v. *Clarke*, 8 App. Cas., 354; *Devonport* v. *Tozer*, (1902) 2 Ch., 182, at p. 193. Sec. 245 indicates *the* remedy, and that is the only remedy. Apart from this, sec. 264 shows that a private individual cannot enforce the penalty. See *R.* v. *Panton, ex parte Schuh*, 14 V.L.R., 529; 10 A.L.T., 115. Sec. 245 would seem to indicate that the Collector for the State is the only person in whose name prosecutions can be instituted. Moreover, they have to be instituted "in his name" only, and not necessarily by him in person. There is nothing inconvenient in that, even under the *Justices Act* 1890. The information may be by a private individual, but it must be in the name of the Collector. The word "collector," in sec. 245 of the *Customs Act* may include "an officer doing duty in the matter in relation to which the expression is used," but the words "the matter in relation to which the expression is used" mean, in that case, the matter in relation to which the prosecution is instituted. Authority to sue is not a "power" which may be delegated under sec. 10. [He referred to *In re Winterbottom*, 18 Q.B.D., 446].

[GRIFFITH, C.J.—Could not the information be amended?]

No, because the prosecution is not instituted in the name of the Collector.

[O'CONNOR, J.—Is it not an amendment that we have power to make under sec. 251?]

The information is not rightly begun, and cannot be amended so as to make it properly begun. The only informant here is Christie, and the amendment would require a new party to be

substituted. This is not merely a case of adding a party to proceedings already begun. [He also referred to *O'Donnell* v. *Hitchen*, 27 V.L.R., 711; 23 A.L.T., 166; *Irvine and Wanliss's Justices Act*, p. 245; *Holden* v. *Moran*, 1 A.L.R., 117; *R.* v. *Templeton*, 3 V.L.R. (L.), 305.]

Starke in reply. When the Collector for the State is designated in the Act he is called by that name. If the interpretation given by the respondent is correct, the order made is wrong. The proper order to make was to strike out the case, because the magistrates had no jurisdiction. *Loft* v. *Wade*, 24 V.L.R., 216; 20 A.L.T., 35; *R.* v. *Charles*, 3 W.W. & A'B. (L.), 52.

[He also referred to *Hughes* v. *Pump House Hotel Co.*, (1902) 2 K.B., 485; *O'Donnell* v. *Chambers*, 26 A.L.T., 73; *Stait* v. *Colenso*, 23 A.L.T., 245.]

Cur. adv. vult.

November 9.

GRIFFITH, C.J. This is an appeal, by way of order to review, according to the Victorian practice, from a decision of a magistrate dismissing an information for an offence against the *Customs Act*. The Order Nisi was granted on two grounds relating to the merits of the case, but before these grounds were argued Mr. Isaacs, who appears for the respondent, objected that the dismissal must stand in any case, because the information before the magistrate was not laid by any person who had authority to lay it. That objection had been taken before the magistrate who disallowed it, and it is, of course, open to the respondent to take it here, for he may support the decision on any grounds. The information is laid by J. M. Christie, who describes himself as of the Customs House, Melbourne. At the hearing he produced documents signed respectively by the Minister of Customs, and by the Collector of Customs, purporting to authorize him to lay informations in inferior Courts of Victoria. It is contended for him that that was sufficient authority to him to lay this information.

Whether he was authorized or not depends on sec. 245 of the *Customs Act*, which provides that "Customs prosecutions may be instituted in the name of the Minister by action information or other appropriate proceeding—(*a*) In the High Court of Australia;

H. C. OF A. 1904.

CHRISTIE v. PERMEWAN, WRIGHT & CO. LTD.

or (*b*) In the Supreme Court of any State; and when the prosecution is for a pecuniary penalty not exceeding Five hundred pounds or the excess is abandoned the Customs prosecution may be instituted in the name of the Collector in (*c*) Any County Court, District Court, Local Court, or Court of summary jurisdiction."

The question is whether the informant is "the collector" within the meaning of that section. The section occurs in Part XIV. of the Act, which is headed "Customs Prosecutions," and deals entirely with customs prosecutions. The object of the section is to define the person in whose name customs prosecutions are to be instituted. To support the right of the present informant to prosecute, reference was made to the interpretation clause, sec. 4, by which it is provided that, except where otherwise clearly intended, "'Collector' includes the Comptroller and any Collector of Customs for the State and any principal officer of customs doing duty at the time and place and any officer doing duty in the matter in relation to which the expression is used." The words "in relation to which the expression is used," obviously qualify the words "time and place," as well as the words "the matter." The contention was put as high as this, that the officer of customs who may institute a prosecution is any officer of customs doing duty in the matter of the prosecution. If we read into sec. 245, the words which, it is said, may be substituted for the words "in the name of the Collector," the section would run, "in the name of the officer doing duty in the prosecution," *i.e.*, in the name of the person who is laying the information. That is, in effect, that any officer of customs may lay an information, provided he is authorized to do so in the course of his duty. Now, the object of the section being to define who is to be the prosecutor, if it was intended that any officer may prosecute, what would have been easier than to say so? It seems very improbable that the legislature could have intended that the word "Collector" should mean "any officer." On reference to the Statute, it will be seen that the word "Collector" is used throughout it in connection with acts to be done in relation to the administration of the law, which cannot be performed in person by the Collector for the State, and which must, therefore, be performed by deputy. The extent of the deputation may vary in different cases. Such acts

may be done by the officer doing duty in the particular matter. Practical illustrations of this are found in various sections. Thus, by sec. 37, "Entries shall be made by the delivery of the entry by the owner to the Collector." The interpretation clause is obviously intended to enable the word "Collector" in that section to be interpreted as "the officer to whom is assigned the duty of receiving entries." Similarly as to sec. 38, "Any person making an entry shall if required by the Collector answer questions," &c., and sec. 39, "Entries shall be passed by the Collector signing the entry." There are scores of such instances of the use of the word "Collector," and, I think, in all of them relating to matters of the administration, the word is used as meaning the Collector or his deputy. But Part XIV. of the Act does not relate to the administration of the Act, but to proceedings in Courts of law. It declares the mode and form in which those proceedings are to instituted. As to one provision in that Part, viz., sec. 260, which provides that "The gaoler of any gaol to which any person has been committed for non-payment of any penalty shall discharge such person . . . (ii.) on a certificate by the Collector that the penalty has been paid or realized," it is very hard to suppose that that means that any officer of customs may sign a certificate and procure the release from prison of a person who is there for what may be a felony. Sec. 214 provides that "Whenever information in writing has been given on oath to the Collector that goods have been unlawfully imported undervalued or entered or illegally dealt with . . . . . the owner shall immediately upon being required so to do by the Collector produce and hand over to him all books and documents relating to the goods," &c. It may be doubtful whether "Collector" there extends beyond the Collector for the State. In sec. 245 it is clear that the interpretation of "Collector," as the Collector for the State, or his deputy, is applicable, and gives a sensible meaning to the section, whereas, if the interpretation clause is applied literally, it makes the section insensible. The object being to say in whose name a prosecution is to be instituted, the section, on the suggested interpretation, would proceed to say "in the name of the person who institutes it." We should not, unless compelled, construe the Act as merely enacting futilities. We think, therefore, that

H. C. of A. 1904.

CHRISTIE v. PERMEWAN, WRIGHT & Co. LTD.

he application of the interpretation clause is excluded by the context, and that the intention of sec. 245 is that the word "Collector" should mean the Collector for the State. The principal objection urged against that construction was that the Collector of Customs for Victoria could not take advantage of the section, so far as it authorizes prosecutions in Courts of summary jurisdiction to be instituted in his name, because, by sec. 8 of the Victorian *Justices Act* 1890, informations are required to be signed by the informant personally. It is to be observed that sec. 245 only requires prosecutions to be instituted *in the name of* the Collector. It does not require any particular person to lay the information personally any more than it requires the Minister to go into Court to institute the prosecution. There is nothing in the *Customs Act* to say that the power conferred on the Collector cannot be exercised by some other person for and on behalf of the Collector. It is a general rule of law that what a person may do himself, he may do by an agent. In *In re Whiteley Partners, Ltd.*, 32 Ch. D., 337, which was the case of a memorandum of association, signed by one person in the name of another, without a power of attorney, *Bowen*, L.J., at p. 340, says:—"In every case when an Act requires a signature it is a pure question of construction on the terms of the particular Act whether its words are satisfied by signature by an agent. In some cases on some Acts the Courts have come to the conclusion that personal signature was required. In other cases on other Acts they have held that signature by an agent was sufficient. The law on the subject is thus summed up by *Blackburn*, J., in *Reg.* v. *Justices of Kent*, L.R., 8 Q.B., 305, 307: 'No doubt at common law, where a person authorizes another to sign for him, the signature of the person so signing is the signature of the person authorizing it; nevertheless there may be cases in which a Statute may require personal signature.' *Quain*, J., then says, 'We ought not to restrict the common law rule, *qui facit per alium facit per se*, unless the Statute makes a personal signature indispensable.' *Archibald*, J., says, 'I think this case comes within the common law rule, *qui facit per alium facit per se*, and there is nothing in the Statute to qualify the operation of that maxim. It is easy to understand

that there may be cases in which a different construction must be put on particular Statutes.' "

Applying the rule so laid down by that very great authority, sec. 248 provides that "Subject to the provisions of this Act the provisions of the law relating to summary proceedings before justices in force in the State where the proceedings are instituted shall apply to all Customs prosecutions before a Court of Summary Jurisdiction in such State." If the provisions of sec. 18 of the Victorian *Justices Act* 1890 were to be interpreted literally, those proceedings would be impossible, except by the Collector himself laying the information. To that extent, then, the provisions of the State Act must be qualified by those of this Act, and the result is to leave the law of Victoria, as to the laying of informations, the same as in most of the other parts of the British Empire, viz., that some other person may lay it for and on behalf of the informant. For the purposes of the *Customs Act* the informant will be the Collector for Victoria, and any difficulty in applying the ordinary rules may be avoided by the person who acts for the Collector stating that the information is laid by him in the name and on behalf of the Collector. In the present case the information was not laid in this way. There appears to be an idea in the department that its detective officer may be a general prosecutor for it. We think that is not the meaning of the Statute, and that this prosecution was not properly instituted. The form in which the authority must be given by the Collector to his deputy is a matter with which we are not concerned.

Mr. Starke suggested that this was a matter for amendment. It is not necessary to consider whether the amendment is one that could be made, for, having regard to the whole case, and the nature of the prosecution, we do not think it is a case in which any amendment ought to be allowed.

Another contention put forward by Mr. Starke was that any person could lay an information for an offence under this Act, on the ground that the penalty is imposed for the benefit of the general public. So to hold would be to interpret the Act in a way inconsistent with the whole history of Customs legislation

H. C. OF A. 1904.

CHRISTIE v. PERMEWAN, WRIGHT & CO. LTD.

in England and in the Colonies, and it would have the effect of rendering the whole of sec. 245 nugatory.

For these reasons the order will be discharged with costs.

Appeal dismissed with costs.

Solicitor, for appellant, *Powers*, Commonwealth Crown Solicitor.

Solicitor, for respondent, *Croker*, Melbourne.

[HIGH COURT OF AUSTRALIA.]

THE LOCAL BOARD OF HEALTH OF THE CITY OF PERTH . . . . . DEFENDANTS, } APPELLANTS;

AND

WESLEY MALEY . . . . . PLAINTIFF, RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1904.

PERTH, *Oct.* 11, 12.

Griffith, C.J., Barton and O'Connor, JJ.

Health Act 1898 (*No.* 24) (*Western Australia*), *sec.* 158—*Local Board—Construction of sewer—Trespass—"Necessary."*

By sec. 158 of the *Health Act* 1898 (No. 24) (Western Australia), a Local Board, *in case it is necessary for the proper drainage of any land* that drains or sewers should be made through private premises, is empowered to make an order on the owner requiring him to permit the construction of such drains or sewers, and, after one month from the making of the order, to form such drains or sewers as may, *in the opinion of the Local Board, be necessary* for the proper drainage of the land (*a*). The defendants, the Local Board of Health of the

(*a*) "158. In case it is necessary for the proper drainage of any land, street, lane, right-of-way, yard, passage, private premises, or other place, that drains or sewers should be made through or under any one or more private premises, whether occupied or not, it shall be lawful for the Local Board to make an order on the owner or owners of such premises requiring such owner or owners to permit the formation of such drains or sewers through or under such premises, and after the expiration of one month from the making of such order the Local Board may form or make through or under such premises such drains or sewers as may in the opinion of the said Local Board be necessary for the proper drainage of any such land, street, lane, right-of-way, yard, passage, private premises, or other place as