[HIGH COURT OF AUSTRALIA.]

THE FEDERAL CAPITAL COMMISSION . PLAINTIFF;

AND

LARISTAN BUILDING AND INVESTMENT COMPANY PROPRIETARY LIMITED } DEFENDANT.

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MELBOURNE, *Oct.* 16; *Nov.* 7.

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Federal Capital Commission—Action before commencement of Judiciary Act 1927—*Jurisdiction of High Court to hear—Claim for kerbing and guttering streets—Power of Commission to make charges—Building and Services Ordinance—Regulations made under—Charges claimed under regulations—Validity of Ordinance—Whether Ordinance repugnant to Seat of Government (Administration) Act* 1924-1928—*The Constitution* (63 & 64 *Vict. c.* 12), *secs.* 52 (1), 75, 76, —*Seat of Government (Acceptance) Act* 1909 (*No.* 23 *of* 1909), *sec.* 8—*Seat of Government (Administration) Act* 1910 (*No.* 25 *of* 1910), *sec.* 12—*Seat of Government (Administration) Act* 1924-1928 (*No.* 8 *of* 1924—*No.* 44 *of* 1928), *secs.* 28A, 29—*Building and Services Ordinance* 1924-1928—*Roads and Footpaths Regulations* 1927.

The Federal Capital Commission sued the defendant, a lessee of certain land at Canberra, to recover the amount of charges imposed by regulation for kerbing and guttering streets upon which the defendant's land abutted. The action was instituted prior to the proclamation of the *Judiciary Act* 1927.

Held, that the High Court had jurisdiction to hear the action under the provisions of sec. 8 of the *Seat of Government Acceptance Act* 1909.

On 20th October 1927 the Federal Capital Commission, in intended exercise of powers expressed to be conferred upon it by the *Building and Services Ordinance* 1924-1925, made certain regulations called the *Roads and Footpaths Regulations*. Clause 4 of these Regulations required a lessee to pay a proportion of the cost of kerbing and guttering the street adjoining his property. The *Building and Services Ordinance* was made as under sec. 12 of the *Seat of Government (Administration) Act* 1910 and not as under sec. 29 of the *Seat of Government (Administration) Act* 1924-1928. The Commission sued the defendant to recover a proportion of the cost of kerbing and guttering the street.

Held, that the Governor-General in Council could not confer upon the Commission the powers contained in the *Building and Services Ordinance* by recourse to sec. 12 of the *Seat of Government (Administration) Act* 1910 as the Ordinance was repugnant to the provisions of the *Seat of Government (Administration) Act* 1924-1928; that the *Roads and Footpaths Regulations* which purported to be made thereunder were consequently void, and that the plaintiff's claim failed.

TRIAL of Action.

The Federal Capital Commission established by the *Seat of Government (Administration) Act* 1924-1928 brought an action in the original jurisdiction of the High Court against the Laristan Building and Investment Co. Pty. Ltd., a lessee of land at Canberra, to recover the amount of certain charges imposed by regulation for kerbing and guttering streets upon which the defendant's land abutted.

The facts and the arguments of counsel are fully stated in the judgment of *Dixon* J. hereunder.

Fullagar, for the plaintiff.

Herring, for the defendant.

Cur. adv. vult.

NOV. 7.

DIXON J. delivered the following written judgment:—

This is an action brought in the original jurisdiction of the Court by the Federal Capital Commission established by the *Seat of Government (Administration) Act* 1924-1928 to recover from a lessee of land in Canberra the amount of some charges imposed by regulation for kerbing and guttering streets upon which the defendant's land abuts.

The first question raised is whether the Court has jurisdiction to entertain the action. Sec. 8 of the *Seat of Government Acceptance Act* 1909 provides that "until the Parliament otherwise provides, the High Court and the Justices thereof shall have, within the Territory, the jurisdiction which . . . belonged to the Supreme Court" of New South Wales "and the Justices thereof." When the action was instituted the *Judiciary Act* 1927 had not been proclaimed and the

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jurisdiction accordingly depends upon this provision. In *Porter* v. *The King*; *Ex parte Yee* (1), *Isaacs*, *Higgins*, *Rich* and *Starke* JJ. upheld an ordinance having the force of law which conferred appellate jurisdiction upon the High Court to hear appeals from the Supreme Court of the Northern Territory. *Knox* C.J. and *Gavan Duffy* J. dissented. They said (2): "In our opinion, the reasoning of the majority judgment in *In re Judiciary and Navigation Acts* (3) establishes the proposition that the jurisdiction of this Court, whether original or appellate, is to be sought wholly within Chapter III. of the Constitution, that the Court exists only for the performance of the functions therein described, and that the Parliament of the Commonwealth, legislating for the peace, order and good government of the Commonwealth, can no more add to or alter the jurisdiction of the Court than it can add to or alter its own legislative powers." They proceeded to express an opinion that sec. 122 of the Constitution did not enable the Parliament directly, or indirectly, to add to the powers of the Court. They said (4): "The status and duties of this Court are explicitly defined in Chapter III. of the Constitution; and an attempt to alter that status or to add to those duties is not only an attempt to do that which is not authorized by sec. 122, but is an attempt to do that which is implicitly forbidden by the Constitution." *Higgins* J., although concurring with the majority as to appellate jurisdiction, said (5):—"The decision in *In re Judiciary and Navigation Acts* does not compel us to put a narrow construction on sec. 122. In the case, an Act had purported to give the High Court jurisdiction to hear and determine any question referred to it by the Governor-General as to the validity of any Act of the Federal Parliament; and the Act was held to be invalid as to that provision. It was held that under the Constitution no *original* jurisdiction could be given to the High Court other than that mentioned in secs. 75 and 76 of the Constitution; but there has been no such decision as to the appellate jurisdiction conferred by sec. 73. Sec. 76 had enacted that 'the Parliament may make laws conferring original jurisdiction on the High Court' in certain

(1) (1926) 37 C.L.R. 432.
(2) (1926) 37 C.L.R., at p. 438.
(3) (1921) 29 C.L.R. 257.
(4) (1926) 37 C.L.R., at p. 439.
(5) (1926) 37 C.L.R., at p. 447.

matters ; and it might fairly be argued that, on the usual principles of construction, Parliament could not confer other jurisdiction : *Expressio unius exclusio alterius.* But there is no such expression as to the powers of Parliament to give appellate jurisdiction. I am, of course, bound by the decision as to original jurisdiction ; but it does not apply to this case. (See also *R.* v. *Bernasconi* (1) ; *Mainka* v. *Custodian of Expropriated Property* (2).)" It thus appears that three of the six members of the Court who took part in the decision of *Porter* v. *The King* ; *Ex parte Yee* (3), treated sec. 122 as insufficient to empower the Legislature to invest the High Court with original jurisdiction in respect of a Territory. The whole Court regarded the decision in *Bernasconi's Case* as showing that Chapter III., dealing with the Judicature, did not extend to the Territories which are governed under the power conferred upon the Parliament by sec. 122.

There is no decision, however, which denies the application of Chapter III. to the Seat of Government. Sec. 122 is dealing, at least primarily, with Territories which do not form part of the Federal system. It is not necessary to discuss the relation between secs. 111, 122 and 125. This case arises in the Seat of Government, and sec. 52 provides that the " Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to (i.) the Seat of Government of the Commonwealth." The Seat of Government is an integral part of the Federal System, and I see no reason for denying the application of sec. 76 to laws made pursuant to sec. 52 (i.). It would follow that a law of the Parliament conferring jurisdiction on the High Court is warranted by sec. 76 (ii.), at least in relation to matters which arise as the result of enactments of the Parliament. It may well be that all claims of right arising under the law in force in the Territory come within this description, because they arise indirectly as the result of the *Seat of Government Acceptance Act* 1909 (see sec. 6), and the *Seat of Government (Administration) Act* 1910 (see secs. 4 to 7 and 12). But it is at least clear that a claim to a right conferred by or under

(1) (1915) 19 C.L.R. 629. (2) (1924) 34 C.L.R. 297.
(3) (1926) 37 C.L.R. 432.

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ordinances made by the Governor-General in Council under sec. 12 of the *Seat of Government (Administration) Act* is a matter arising under an enactment of the Parliament. A difficulty arises upon the terms of sec. 8 of the *Seat of Government Acceptance Act* 1909, because it confers jurisdiction, not by reference to "matters," in the manner which sec. 76 contemplates, but by reference to the jurisdiction of the Supreme Court of New South Wales. The jurisdiction of that Court depends in the main on service of process and not upon subject matter, and it may extend beyond that which could be conferred under sec. 76 (II.). It does not follow, however, that sec. 8 does not operate to the full extent authorized by sec. 76.

The original jurisdiction has been exercised without question in *Pitcher* v. *Federal Capital Commission* (1). Neither party in the present case desires to contest the jurisdiction of the Court, and I think I am warranted in assuming jurisdiction and stating my conclusion upon the merits of the case.

The defendant Company is a lessee of certain blocks of land at Canberra, which have a frontage to a road called Northbourne Avenue and, at the rear, abut upon another road. Before 20th October 1927 the Federal Capital Commission formed the kerbing and guttering upon that side of Northbourne Avenue which the defendant's blocks adjoin. On 20th October 1927 the Federal Capital Commission in the intended exercise of powers expressed to be conferred upon it by the *Building and Services Ordinance* 1924-1925 made some regulations to come into operation forthwith called the *Roads and Footpaths Regulations*. In May and June 1928 the Commission formed the kerbing and guttering on the road upon which the defendant's blocks abutted at the rear. Clause 4 of the *Roads and Footpaths Regulations* provides that where the Commission forms or has before the commencement of the Regulations formed any concrete footpath or any kerbing or guttering on any road, the lessee of any land adjoining the road and on the same side of the road as the footpath, kerbing or guttering shall pay a proportion of the cost as ascertained and specified by and under the Regulations. The Commission now sues to recover the sum of £27 2s. 7d., which is composed of a sum of £9 17s. 7d., the defendant's

(1) (1928) 41 C.L.R. 385.

proportion of the cost of forming the kerbing and guttering of Northbourne Avenue; and a sum of £17 5s., its proportion of the cost of forming the kerbing and guttering of the road at the rear of the blocks.

The defendant attacks the validity of the *Roads and Footpaths Regulations*. Its contention is that the *Building and Services Ordinance*, in so far as it purports to authorize these Regulations, is beyond the powers of the Governor in Council. The Ordinance was made as under sec. 12 of the *Seat of Government (Administration) Act* 1910. Sub-sec. 1 of this section originally provided that "until the Parliament makes other provision for the government of the Territory, the Governor-General may make ordinances having the force of law in the Territory." But sec. 16 of the *Seat of Government (Administration) Act* 1928 inserted sec. 28A in the *Seat of Government (Administration) Act* 1924-1926, and provided that it should be deemed to have commenced on the date of the passing of the *Seat of Government (Administration) Act* 1924, namely, 23rd July 1924—a date actually anterior to the commencement of that Act, which, pursuant to its second section, was proclaimed to commence on 1st January 1925. Sec. 28A, thus inserted, provides that sec. 12 of the *Seat of Government (Administration) Act* 1910 is amended by omitting the words "until the Parliament makes other provision for the government of the Territory." It follows that, as from 23rd July 1924, sec. 12 must be read as enacting simply that "the Governor-General may make ordinances having the force of law in the Territory."

In determining the meaning and effect of this provision the strict rule of interpretation perhaps requires that the former existence and repeal of the opening words of limitation should be disregarded. "I take the effect of repealing a statute to be, to obliterate it as completely from the records of the Parliament as if it had never passed; and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law" (per *Tindal* C.J. in *Kay* v. *Goodwin* (1)). Nevertheless it is difficult to avoid interpreting the amended sec. 12 as if it ran "although the Parliament shall

(1) (1830) 6 Bing. 576, at p. 582; 130 E.R. 1403, at p. 1405.

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make other provision for the government of the Territory, the Governor-General may make ordinances having the force of law in the Territory." It is almost impossible to treat the repeal of the limitation with which it began, as anything less than an express declaration that the making of other provision for the government of the Territory shall not impair the power to make ordinances. But even with such an express declaration the power to make ordinances could not, in my opinion, be read as authorizing the Governor-General to make ordinances repugnant to a Commonwealth statute. It is one thing to say that the legislative power of the Governor-General shall continue although Parliament shall establish a means of governing the Territory, and another thing to say that that legislative power may be exercised in a manner incompatible with a law made by Parliament itself.

The *Building and Service Ordinance* relied upon by the plaintiff is impeached by the defendant upon the ground that it is repugnant to the *Seat of Government (Administration) Act* 1924-1928. That statute sets up the Federal Capital Commission, regulates its constitution and describes its powers. Sec. 14 enumerates the powers of the Commission. It provides that, subject to this Act and to any ordinance made in pursuance of the *Seat of Government (Administration) Act* 1910, the powers of the Commission in relation to the Territory shall include matters which are set out in sixteen paragraphs. The words " subject to this Act and to any ordinance " mean that the Commission's powers must be exercised in conformity with the particular provisions of the Act, and with those of any ordinance. Whilst they show that the authority conferred by the section upon the Commission is not superior, but subordinate, to the legislative power of the Governor-General in Council, these words indicate no intention that the legislative power of the Governor-General in Council may be exercised otherwise than consistently with the will of Parliament as disclosed by this or any other statute.

It was contended that the word " made " in the expression " ordinance made in pursuance of the *Seat of Government (Administration) Act* 1910 " confined its application to ordinances existing at the commencement of the *Seat of Government (Administration) Act* 1924. But although there was something to be said for this

construction of the words before the insertion of sec. 28A, inasmuch as upon the commencement of the Act the Governor-General in Council may no longer have had power to make any relevant ordinance, it does not seem to be the natural meaning to place upon the words when the Act expressly or impliedly provides for the continuance of that power, as this Act must now be taken to have done from the beginning. Sec. 29 empowers the Governor-General to make regulations, not inconsistent with the Act, prescribing all matters which are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act, and in particular for more accurately defining the powers conferred on the Commission by the Act, and for specifying other matters with respect to which the powers of the Commission in relation to the Territory shall extend. Sec. 16 gives the Commission a power to make by-laws not inconsistent with the Act or with any regulation made under the Act, or with any ordinance made in pursuance of the *Seat of Government (Administration) Act* 1910, prescribing all matters which appear to it to be necessary or convenient for carrying out or giving effect to any power conferred by the Act, and in particular for prescribing penalties not exceeding £50 or imprisonment for three months for any contravention of the by-laws. By-laws cannot take effect without the prior approval of the Governor-General in Council save in cases of urgency, and then they cease to have effect unless his approval is afterwards given within sixty days. In every case the by-laws must be laid before both Houses of Parliament, and they cease to have effect if either House within the next fifteen days disallows them. The powers enumerated in sec. 14 include the following: (*d*) the construction, maintenance and control of roads, bridges, culverts, levees, sewers, drains and water-courses; (*e*) the provision of gas, electricity, water and sewerage; (*i*) the protection of public health, and the maintenance of sanitation; (*l*) such other matters as are specified in any regulation made under this Act.

The parties are agreed that, in making the *Building and Services Ordinance* 1924-1928 empowering the Commission to make regulations, the Governor-General did not avail himself of the power conferred by sec. 29 of the *Seat of Government (Administration) Act* 1924-1928,

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and that the Ordinance cannot be supported, save as an exercise of the power conferred by sec. 12 of the *Seat of Government (Administration) Act* 1910. The *Building and Services Ordinance* 1924 was notified in the *Gazette* of 10th October 1924, and came into operation before the *Administration Act* of that year. Sec. 2 of the Ordinance provided that the Minister may make provision for the supply of water, electricity and other services to the residents of the Territory. It seems scarcely likely that two authorities were intended to supply water and electricity and similar services; and it may therefore be thought that this provision was superseded and became inoperative on 1st January 1925, when the *Seat of Government (Administration) Act* of 1924 came into force. It must be remembered, however, that sec. 14 is expressed to be subject to any ordinance, and these words may prevent such a result. However this may be, a new meaning, and perhaps operation, was given to sec. 2 of the *Building and Services Ordinance* 1924 by sec. 5 of the *Federal Capital Commission's Powers Ordinance* 1924 (No. 12 of 1924), made in contemplation of the commencement of the *Seat of Government (Administration) Act* 1924 and the consequent establishment of the Commission. Sec. 5 provides that the powers and functions, exercisable under this, and certain other ordinances, by the Minister, shall be exercised by the Commission, and that any reference in any such ordinance to the Minister shall be read as a reference to the Commission. Read in combination these ordinances purport to confer upon the Commission an authority to make provision for the supply of water, electricity and other services to residents of the Territory. The Commission's Act gives it authority to provide a number of "services" including gas, electricity, water and sewerage. What is comprised in the expression "other services" in the Ordinance, and what limitation is involved in the word "residents," is by no means clear. What is clear is that the two powers are addressed substantially to the same subject. The Ordinance was amended by Ordinance No. 9 of 1925, which came into operation on the 5th November 1925. This inserted sec. 4, which empowered the Commission to make Regulations "not inconsistent with this Ordinance . . . prescribing all matters which are required or permitted to be prescribed, or which are necessary or convenient

to be prescribed, for carrying out or giving effect to this Ordinance, and in particular prescribing matters provided for and in relation to (*a*) the conditions subject to which buildings may be erected in the Territory; (*b*) the conditions upon which sewerage, water and electric services may be supplied in the Territory; (*c*) the charges to be made for services supplied in pursuance of this Ordinance; (*d*) the purposes for which and the conditions upon which, licences may be issued and the fees payable therefor"; and "(*e*) the imposition of penalties not exceeding fifty pounds, or imprisonment for three months for offences against any regulations made under this Ordinance, and, where the offence is a continuing offence, a penalty not exceeding five pounds per day during the period for which the offence continues." It will be noticed that par. (*b*) covers ground which is included in par. (*e*) of sec. 14 (1) and therefore might have been made the subject of a by-law under sec. 16. The by-law would have required the approval of the Governor-General in Council and would be subject to disallowance by either House of Parliament. The regulation is subject to neither of these conditions. The by-law could not, but the regulation could, impose a daily penalty for a continuing offence. Sec. 17 (1) (*b*) shows that the revenue of the Commission shall include charges for services, and there can be no doubt that secs. 14 and 16 enable a by-law to be made "providing for and in relation to the charges to be made for sewerage, water and electric services supplied, in the Territory." Thus par. (*c*) of sec. 4 (1) of the Ordinance also covers ground identical with that covered by the bylaw-making power. It is not clear whether this is true of par. (*a*), which relates to the conditions subject to which buildings may be erected in the Territory. This may extend further than sec. 14 (1) (*ka*) inserted by the *Seat of Government (Administration) Act* 1926. On the other hand, it may be covered by sec. 14 (1) (*i*) and (*m*), which provide for (*i*) the protection of public health and the maintenance of sanitation and (*m*) generally the municipal government of the Territory. It is clear, however, that the power might have been given pursuant to sec. 14 (1) (*l*) and sec. 29 as a matter specified in a regulation made by the Governor-General in Council. The generality of expression in sec. 4 (1) (*d*) of the

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Ordinance makes its meaning doubtful, but probably it should be construed as referring only to licences permitting that to be done which regulations made under the Ordinance either restrain or prohibit. If so, it covers no more than would be contained in the powers taken under sec. 14 (1) which have already been discussed.

The regulations relied upon by the Commission, the *Roads and Footpaths Regulations*, were made pursuant to this Ordinance. They manifestly exceeded the powers at this time conferred by the Ordinance because they imposed a charge upon the frontagers for forming the footpaths, kerbing and guttering of public highways, and this no reasonable interpretation, however liberal, of secs. 2 and 4 (1) (*c*) of the Ordinance could justify. Accordingly, in 1928, a new Ordinance was made by which sec. 2 was amended so that it read: "the Minister may make provision for the supply of services to residents of the Territory"; and par. (*b*) of sec. 4 (1) was amended so that it read: "the conditions upon which services may be supplied by the Commission in the Territory." The word "services" was then defined to include the supply of water, electricity, the provision of a sewerage system, the collection and disposal of garbage and the construction of footpaths, kerbs and gutters. It was further provided (sec. 2) that the Ordinance shall be deemed to have commenced on 5th November 1925. The collection and disposal of garbage is a matter which comes within "public health and sanitation," and the construction of footpaths, kerbs and gutters within "the construction, maintenance and control of roads, bridges, culverts, . . . drains." The necessary alteration, however, in the meaning of sec. 4 (1) (*c*), which enables a charge for services to be made by regulation is probably outside secs. 14 and 16 of the *Seat of Government (Administration) Act* 1924-1928 unless the word "rates" in sec. 14 (1) (*b*) receives a wide construction (as to which see *Wilkinson* v. *Collyer* (1); *Direct Spanish Telegraph Co.* v. *Shepherd* (2); *Badcock* v. *Hunt* (3)). There could be no doubt, however, that sec. 29 would enable the Governor-General in Council to confer this power upon the Commission.

(1) (1884) 13 Q.B.D. 1, at p. 5.
(2) (1884) 13 Q.B.D. 202.
(3) (1888) 22 Q.B.D. 145.

It follows that what has been done by the *Building and Services Ordinance* 1924-1928 is to confer powers upon the Commission to do by regulation what for the most part it can do by by-law and for the rest it can be empowered to do by law. The effect of this is that it is authorized to do, without the approval of the Governor-General in Council and without the control of the Houses of Parliament, that which it already can do, or can be empowered to do under the bylaw-making power given by the Administration Act 1924-1928, but subject only to that approval and that control. When the Administration Act 1924-1928 gave these powers affirmatively, subject to such conditions, it would naturally be understood to intend that they should not be enjoyed without such conditions. The case is one which comes within the observation made by *Eyres* J. in *Harcourt* v. *Fox* (1) to the effect that affirmative statutes introductive of a new law imply a negative.

No doubt the presence of sec. 28A in the *Seat of Government (Administration) Act* 1924-1928 is an important consideration. It shows clearly that the commencement of that Act was not intended to bring to an end the operation of sec. 12 of the Act of 1910. It does not, however, justify the contention that in the exercise of the power conferred by sec. 12 the Governor-General in Council could override the Act of 1924-1928. It can hardly be doubted, for instance, that an ordinance which sought to abolish the Commission would be void because flatly inconsistent with sec. 5 (1). Similarly any attempt to vary by ordinance any of the provisions made by secs. 6, 6AA, 6AB, 6A and 7 to 13 would be *ultra vires*. No greater effect can be attributed to the insertion of sec. 28A in the Act of 1924 as from the date of the first enactment of the statute than from an express statement of intention that the Governor-General in Council should continue to have power to make ordinances not repugnant to this or any other statute of the Commonwealth. It follows that the Governor-General could not confer upon the Commission the powers contained in the *Building Services Ordinance* by recourse to sec. 12 of the Administration Act of 1910.

In the view taken, it is not necessary to distinguish between those matters in the Ordinance which relate to subjects already contained

(1) (1693) 1 Show. K.B. 506, at p. 520; 89 E.R. 720, at p. 726.

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within sec. 14 (1) of the Administration Act 1924-1928, and those subjects which could be brought within it by the exercise of the power conferred by sec. 29. If a distinction were to be drawn, I am by no means convinced that the subject of the construction of footpaths, kerbs and gutters is severable from the rest of the Ordinance, nor is itself severable into parts one of which relates to the levy of charges and the other to the work of construction.

It is unnecessary also for me to determine the questions which arise in the application of the regulation itself. These were whether so much of clause 4 (1) as imposes a charge in respect of footpaths, kerbing and guttering formed before its commencement is valid, and whether clause 5, which was not complied with is directory or mandatory.

For these reasons I think the plaintiff's claim fails. The action will be dismissed with costs.

Action dismissed with costs.

Solicitor for the plaintiff, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

Solicitors for the defendant, *H. E. Elliott & Co.*

H. D. W.

[*Note.*—See now *Seat of Government (Administration) Act* 1930 (No. 2 of 1930)—*Ed. C.L.R.*]