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[HIGH COURT OF AUSTRALIA.]

WING ON AND COMPANY LIMITED . . . APPELLANT ;

DEFENDANT,

AND

THE COLLECTOR OF CUSTOMS FOR NEW }
SOUTH WALES } RESPONDENT.

PLAINTIFF,

Customs—Imported goods—Failure by importer to enter goods—Goods purchased from importer—Resold by purchaser—Payment of duty—Liability of purchaser—“ Owner ”—Customs Act 1901-1935 (No. 6 of 1901—No. 7 of 1935), secs. 4, 153.*

Certain goods, brought into Australia at different times, were not entered at the customs and no duty was paid upon them. The defendant, knowing that the duty thereon had not been paid, purchased the goods from the importer and sold them to a third party.

Held that the defendant, notwithstanding such resale, remained liable to pay the unpaid duty charged upon the goods and payable by the owner thereof under sec. 153 of the *Customs Act* 1901-1935.

Decision of *Starke J.* affirmed.

APPEAL from *Starke J.*

In an action brought in the High Court and heard before *Starke J.*, the Collector of Customs for the State of New South Wales claimed from Wing On & Co. Ltd., eastern and general merchants and whole-

* The *Customs Act* 1901-1935 provides :—Sec. 4 : “ In this Act except where otherwise clearly intended . . . ‘ Owner ’ in respect of goods includes any person (other than an officer of customs) being or holding himself out to be the owner, importer, exporter, consignee, agent, or person possessed of, or beneficially interested

in, or having any control of, or power of disposition over the goods.” Sec. 153: “ All duties shall constitute Crown debts charged upon the goods in respect of which the same are payable and payable by the owner of the goods and recoverable at any time in any court of competent jurisdiction by proceedings in the name of the collector.”

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sale fruit and produce agents carrying on business at Ultimo Road and Quay Street, Sydney, the sum of £352 18s. 6d. in respect of customs duty on certain boxes and packets of cigarette papers, payable by the defendant as owner of the goods within the meaning of the *Customs Act* 1901-1935, which were alleged to have been imported into Australia and to have come into the possession of the defendant on or about certain specified dates.

The relevant facts are set forth in the judgment of *Starke J.* hereunder.

E. M. Mitchell K.C. and *Henchman*, for the plaintiff.

Spender K.C., *A. R. Taylor* and *Allen*, for the defendant.

STARKE J. entered judgment in the action for the plaintiff for £345 15s. and subsequently gave his reasons therefor as follows:—

On 6th September 1937 I entered judgment in this action for the plaintiff, the Collector of Customs, for £345 15s. in respect of customs duties which he claimed to be due from the defendant. All that remains is for me to state shortly the reasons for that judgment. The facts, as I find them, were these:—A Chinese seaman on the s.s. *Marella*, called variously Jang Sang or Jong Seng, brought cigarette papers into Australia in the years 1934 and 1935, none of which were entered at the customs. In June 1934 the defendant obtained from Jang Sang 59 boxes of these cigarette papers described as “Zig Zag” cigarette papers and paid him therefor the sum of £41 6s. and sold 50 of these boxes to an hotel-keeper for £46 5s. In August 1934 the defendant obtained from Jang Sang 189 boxes of these cigarette papers described as “Zig Zag” cigarette papers, and they were invoiced to it for £163 16s. The defendant paid Jang Sang £132 6s. for these papers, and sold 140 of them to the hotel-keeper, who paid the defendant £119 therefor. About March 1935 the defendant also obtained from Jang Sang 107 boxes of these cigarette papers, described as “Zig Zag” cigarette papers, and also 259 boxes of these cigarette papers, described as “Repeater” cigarette papers, and paid him therefor £181 14s. 9d.

The customs duties payable in respect of these cigarette papers amount to £345 15s. The defendant knew that the cigarette papers had not been entered at the customs and that no duty had been paid in respect of them. The question is whether the defendant is liable to pay that duty. The customs duties were imposed by the *Customs Tariffs* 1933, sec. 6. The *Customs Act* 1901-1935, sec. 153, provides that all duties shall constitute Crown debts charged upon the goods in respect of which the same were payable, and payable by the owner of the goods and recoverable at any time in any court of competent jurisdiction by proceedings in the name of the collector. Sec. 4 provides that, except where otherwise clearly intended, "owner" in respect of goods includes any person (other than an officer of the customs) being or holding himself out to be the owner, importer, exporter, consignee, agent or person possessed of or beneficially interested in or having any control of or power of disposition over the goods. Sec. 132 provides that all import duties shall be paid at the rate in force when the goods are entered for home consumption. The customs duties are charged upon the goods and become a debt due to the Crown immediately upon importation. The *Customs Tariffs* 1933 does not explicitly provide who is liable to pay the duties, but primarily the importer is liable (*Brook's Wharf and Bull Wharf Ltd. v. Goodman Brothers* (1)). The levying of the duties is regulated by the *Customs Act* 1901-1935. And, as already mentioned, those Acts prescribe that the duties shall be payable by the owner of the goods.

It was contended for the defendant that the owner of the goods liable for the duties is the person importing the same into Australia, and, further, that the duties only become payable upon the entry of the goods for home consumption. It must be observed, however, that the cigarette papers were at all times material subject to the control of the customs (See sec. 30), and it was the duty of the owner to enter them at the customs (See secs. 68-71 and sec. 37). It would seem that a person possessed of or having any control of or power of disposition over goods subject to the control of the customs could not move or interfere with them except in accordance with the Act (See sec. 33). And such a person can and should enter

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the goods at the customs, because he is the owner thereof within the meaning of the Act. Now when sec. 153 charges the duties upon the goods in respect of which the same are payable, and payable by the owner of the goods, there is no reason why the word "owner" should not have the extended meaning given to it by sec. 4 and include persons possessed of or having control of or power of disposition over the goods. In my judgment these words are not limited to an owner, within the extended meaning of the Act, at the moment of importation, but extend to all persons who have goods in their possession, control or disposition charged with customs duties which have not been paid.

The defendant became possessed of uncustomed goods and exercised control and a power of disposition over them, and thus, in my opinion, became liable for the duties. The other argument based upon sec. 132, that the duties shall be paid at the rate in force when goods are entered for home consumption, is met, I think, by the reasons given for the decision in *Attorney-General v. Ansted* (1). It was the duty of the defendant when it became possessed of uncustomed goods to enter them at the customs, and it cannot excuse itself by neglecting to perform this duty.

Certain convictions were tendered by the plaintiff and admitted in evidence in this action, but I have not acted upon them, for they may have been based upon the provisions contained in sec. 255 of the *Customs Act*, which I think are inapplicable to this action, and also because a conviction for an offence is not, I think, relevant evidence in a civil proceeding of the matters of fact involved in that conviction.

From that decision the defendant appealed to the Full Court.

Clancy K.C. (with him *A. R. Taylor*), for the appellant. The appellant was not the owner of the goods, within the meaning of sec. 153 of the *Customs Act*, for the purpose of being made liable for customs duty. Notwithstanding the extended meaning given to it in sec. 4, the word "owner" in sec. 153 does not operate to impose a liability upon (a) persons who were not owners at the time of importation, or (b) upon mesne owners, neither owners at the time of importation nor at the time of the demand for duty. The

(1) (1844) 12 M. & W. 520 ; 152 E.R. 1304.

“owner” who is liable for duty is the importer; the imposition of the duty is contemporaneous with the importation of the goods into the Commonwealth (See secs. 68-71 and 162 of the *Customs Act*, and sec. 6 of the *Customs Tariffs* 1933). The wide meaning given to the word “owner” in sec. 4 of the *Customs Act* was intended to embrace all persons who had control and custody of the goods, for no matter how short a period, at the time of importation. This view is supported by the provisions of sec. 284 of the English Act, which were enacted prior to the relevant provisions in the *Customs Act*. In *Brook's Wharf and Bull Wharf Ltd. v. Goodman Brothers* (1) the owner was the actual importer: the question litigated was whether the warehouseman who had given a bond for the payment of duty was liable for the duty. The effect of construing secs. 153 and 4, which are in the “machinery” Act and not the taxing Act, as imposing a liability on any one of a number of owners would be to create a new obligation, that is, one which is not created by the taxing Act. If that were so, then all the other provisions of the “machinery” Act which were not taxing provisions would be void because of sec. 55 of the Constitution. The effect of sec. 55 was considered in *Waterhouse v. Deputy Federal Commissioner of Land Tax (S.A.)* (2). The appellant had ceased to be the owner of the goods; it was a mesne owner, therefore the principle enunciated in *Federal Commissioner of Taxation v. Hipsleys Ltd.* (3) does not apply.

[RICH J. referred to *Sargood Brothers v. The Commonwealth* (4).]

No subsequent owner or *de facto* owner of goods would fall within the definition there given.

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E. M. Mitchell K.C. (with him *Henchman*), for the respondent. Sec. 30 of the *Customs Act* shows that all goods imported, including smuggled goods which may have been sold to a purchaser, remain subject to the control of the customs. Entries may be made at any time by any person who for the time being is the owner of the goods (See sec. 36). The making of such entries is not confined to the importer or the owner at the time of importation. The subject

(1) (1937) 1 K.B. 534.

(2) (1914) 17 C.L.R. 665.

(3) (1926) 38 C.L.R. 219, at p. 226.

(4) (1910) 11 C.L.R. 258, at p. 300.

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goods were imported goods and, although they had been purchased by the appellant who was not the actual importer thereof, they remained subject to the control of the customs. The word "owner" was given a wide meaning in order to facilitate the collection of duty (*Brook's Wharf and Bull Wharf Ltd. v. Goodman Brothers* (1)). The person primarily liable is the importer, but it is significant that the definition was not confined to importer. The section itself does not necessitate, nor does the framework, nor the general principle of customs legislation necessitate, the insertion of the words "owner at the time of importation." Secs. 68-71 do not support the contrary view. On the evidence the appellant may be regarded as the consignee of the goods. It is beyond dispute that the appellant did become the owner of the goods and that duty had not been paid on those goods. The matter is clearly within the ambit of sec. 153. The unpaid duty is a statutory charge upon the goods and, until paid, liability therefor is borne by the importer and any other person who comes within the scope of the definition of the word "owner" in sec. 4. The charge imposed by sec. 153 is a charge upon the goods in the hands of any "owner." The "owner" is the owner of the goods so charged, that is, any owner of the goods so charged. Liability for customs duty cannot be escaped by an abandonment of ownership (*United States v. One Case Paintings, Engravings and Manufactures of Metal* (2)). The provisions of the *Customs Act* are enforced against all the people specified, notwithstanding that they may have been bona fide purchasers for value without notice (*United States v. Certain Diamonds* (3)). The doctrine of continuance of ownership is not necessary. The *Customs Act* is wholly within the Constitution and is valid. [He was stopped on this point.]

Clancy K.C., in reply. The word "owner" as used in sec. 153 does not necessarily mean importer; it may mean a variety of persons, but the owner is the person who is actually the one responsible for the goods and who can be ascertained and located at the time the goods are imported or landed.

Cur. adv. vult.

(1) (1937) 1 K.B., at pp. 540, 542, 545.

(2) (1900) 99 Federal Reporter 426.

(3) (1887) 30 Federal Reporter 364.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a judgment of *Starke J.* for the plaintiff for the full amount claimed in an action as customs duty payable by the defendant upon cigarette papers imported into the Commonwealth. Judgment was entered for the plaintiff for £345 15s. with costs. The evidence showed that the cigarette papers were brought into Australia by a Chinese named Jang Sang (or Jong Seng). The goods were not entered at the customs and no duty was paid upon them. The defendant company purchased them from Jang Sang, knowing that no duty had been paid in respect of them. There is, however, no finding that the defendant was a party to the smuggling of the goods. The defendant sold them to a third party.

Sec. 153 of the *Customs Act* 1901-1935 is as follows : “ All duties shall constitute Crown debts charged upon the goods in respect of which the same are payable and payable by the owner of the goods and recoverable at any time in any court of competent jurisdiction by proceedings in the name of the collector.” Sec. 4 of the Act provides as follows : “ ‘ Owner ’ in respect of goods includes any person (other than an officer of customs) being or holding himself out to be the owner, importer, exporter, consignee, agent, or person possessed of, or beneficially interested in, or having any control of, or power of disposition over the goods.”

The plaintiff contends that the defendant company became owner of the goods, and that it therefore became liable to pay the customs duty. The defendant, on the other hand, contends that the only person upon whom sec. 153 imposes any personal liability to pay customs duty is the importer. Sec. 153 imposes the liability upon the “ owner,” but the defendant argues that, as the liability to pay duty attaches at the moment when the goods are imported (*Customs Tariffs* 1933, sec. 6), the “ owner ” referred to in sec. 153 can only be the importer, who is brought within the term “ owner ” by reason of sec. 4. The defendant contends that sec. 153 does not impose any liability to pay the duty upon any person who becomes owner of the goods subsequently to their importation.

It may be observed that the argument that only the importer is liable to pay duty depends entirely upon the introduction into

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sec. 153 of the "definition" contained in sec. 4, because it is only that definition which makes the importer as such liable to perform whatever duties are imposed by the Act on the "owner." Much attention was directed in the argument upon the appeal to the definition of "owner" in sec. 4, but, in my opinion, the definition is not important in this case. The defendant, in fact, became the owner of the goods in the ordinary sense when he bought them from Jang Sang, and it is not necessary to have recourse to the definition in the section for the purpose of showing that the defendant was, during a period, the owner of the goods. The real question is whether any personal liability to pay the duty attached to the defendant when it became the owner of the goods and, if so, whether that liability remained with it until the duty was paid by some person. The defendant in this case can concede that any person who satisfies the definition of "owner" at the time of importation becomes liable to pay the duty. In the present case, the only such person was Jang Sang, who in fact was the importer.

Owners obtain few rights but become subject to many duties under the *Customs Act*. The object of the definition of owner in sec. 4 is to extend to several persons liabilities in respect of the same goods. Though a consideration of the Act as a whole shows that this must be the case, yet it is, of course, necessary to consider the precise language of sec. 153. But the general consideration mentioned may at least operate to remove any surprise which might otherwise be produced by the proposition that more than one person may be liable to the Crown for the same amount of customs duty.

Before considering the construction of sec. 153, it is desirable to call attention to certain other sections of the *Customs Act*. Sec. 30 provides that "goods shall be subject to the control of the customs . . . (a) As to goods imported—from the time of importation until delivery for home consumption or until exportation to parts beyond the seas whichever shall first happen." "Delivery for home consumption" plainly refers to lawful delivery by the customs authorities (See sec. 33, which makes it an offence to move or interfere with goods except by authority and in accordance with the Act). Sec. 36 provides that entries may be made and passed for all goods subject to the control of the customs, and sec. 37 provides that

entries shall be made by the delivery of an entry by the owner to the collector. Sec. 68 provides that "all imported goods shall be entered either—(a) For home consumption; or (b) For warehousing; or (c) For transhipment."

Sec. 229 provides that all goods which are smuggled or unlawfully imported shall be forfeited to His Majesty. The same section also provides in par. *g* that all goods which, being subject to the control of the customs, are removed, &c., except by authority and in accordance with the Act, shall be forfeited to His Majesty. Sec. 233 imposes a penalty upon any person who smuggles any goods.

After Jang Sang unlawfully imported the goods and while they were still in his possession the legal position was as follows:—
 (a) Jang Sang was liable to pay duty on the goods as owner in the ordinary sense (ownership being inferred from possession in the absence of contrary evidence). He was also owner under sec. 4, because he was the importer and was also a person possessed of or having control over the goods. (b) The goods were charged with the duties (sec. 153). (c) The goods were liable to forfeiture (sec. 229 (a) and (g)). (d) The goods were subject to the control of the customs (sec. 30 (a)). (e) Jang Sang was under a statutory obligation to enter the goods (secs. 36, 37 and 68).

It is not disputed on behalf of the defendant that Jang Sang continued to be liable to pay the duties, whether or not he parted with the ownership or possession of the goods. This particular liability, which became attached to him by virtue of sec. 153, continues until it is discharged by payment or otherwise. It is admitted that he could not get rid of his liability to pay the duty by getting rid of the goods.

When the defendant purchased the goods from Jang Sang the legal position was as follows:—(1) The duties had not been paid and were still payable by some person or persons. The defendant admits that they were still payable by Jang Sang but contends that they were not payable by the defendant. (2) The goods were still charged with the duties. (3) The goods were still liable to forfeiture. (4) The goods were still subject to the control of the customs. (5) Both Jang Sang and (I think) the defendant could be called upon to make an entry of the goods.

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Thus the legal liabilities mentioned or indicated in *a* to *e* continued to exist, but, the defendant contends, with the exception that the defendant is not personally liable to pay the duties and, possibly, is not bound to make an entry, though there has been no argument on the latter point, which need not be further considered in the present case.

When the defendant sold the goods to a third party and parted with the possession of them, the position remained as described, certainly as to all the matters mentioned under *b* to *e* and 2 to 5, except, according to the defendant's contention, in relation to the matters mentioned under (1) and (*a*). The new purchaser would be in the same position as the defendant in relation to liability to pay duties and to make an entry, whatever that position may be.

As already stated, it has not been argued that Jang Sang became free of the liability to pay duty when he ceased to be the owner of the goods. This continuous liability was derived from the fact that he was owner of the goods within the meaning of sec. 153. That section imposes the liability on him because he was the owner of imported goods which had not paid duty. In my opinion, as *Starke J.* held, the defendant was in exactly the same position. The argument for the defendant really seeks to add after the words "the owner of the goods" in sec. 153, the words "at the time of importation." I can see no reason for adding such words.

This view is, I think, supported by an analysis of the effect of sec. 153 in relation to its operation in charging the duties on the goods as well as in imposing a personal liability to pay the duty upon the owner. The duties are declared to be Crown debts charged upon the goods "in respect of which the same are payable." The duties are so charged so long as they remain payable, that is, until they have been paid by some person. By whom then are the duties so charged to be paid? They are "payable by the owner of the goods." The charge on the goods follows the goods until the duties are paid, and the liability of the owner to pay, if he becomes liable to pay at all, lasts until the duties are paid. So, also, a personal liability arises in the case of any person who becomes owner of the goods before the duties are paid. That liability continues to exist until it is discharged by some person satisfying the

obligation to pay the duties. I can see nothing in this section to support a contention that the importer or any other person who becomes liable by virtue of the section can be freed from that liability in any other way. The liability to pay the duty follows the goods as a charge and also follows the ownership of the goods as a personal liability until the duty ceases to be payable.

I am, therefore, of opinion that the judgment of the learned judge was right and that the appeal should be dismissed.

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RICH J. Although, no doubt, general considerations arising upon other provisions of the *Customs Act* 1901-1935 may provide a guide as to the general intention, the decision of this appeal finally turns upon the interpretation of sec. 153 of the Act. More especially it turns upon the meaning of the words "payable by the owner of the goods." Ownership of commercial goods is a transferable and, therefore, a transient condition or relation. This is so even when "owner" is used in the extended sense of sec. 4. The suggested meanings among which we are to choose are: (a) "owner at the time of arrival," (b) "owner at the time of entry," (c) "owner for the time being until the control of the customs ends," and (d) "each and every owner from arrival until the control of the customs ends." It is not possible to make the choice without misgiving, but I think a clue is to be found in the manner in which the section constitutes the duty a charge upon the goods and immediately proceeds to make it payable by "the owner." This suggests that the mind of the draftsman was, first, that the duty should be a debt, next, that the debt should follow and be answerable out of the goods and, third, that the obligation to discharge it should follow ownership. It is unnecessary to say whether this indication carries the fourth of the four meanings in its full application, as the Crown contended. But it does show that it was intended that until the goods were entered for home consumption at least none was to take ownership except *cum onere*, and that if he enjoyed full ownership he should pay the charge, i.e., the duty. The facts show that this was the situation of the appellant who, I think, comes fairly within the meaning of the provision making the duty payable by the owner.

In my opinion the appeal should be dismissed.

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DIXON J. The evidence shows that when in June and August 1934 and March 1935 the s.s. *Marella*, trading from Singapore to Australian ports, called at Sydney the defendant company became possessed of parcels of smuggled cigarette papers. Admissions made by the managing director of the company, by name Gock Chew, showed that they had been brought in by someone aboard the *Marella* and paid for by the company on delivery. The goods were not upon the ship's manifest. Gock Chew said that he bought all the cigarette papers from a Chinese member of the ship's crew, named Jang Sang. He said also that, after buying goods on 2nd October 1934, he became frightened to do business that way and told one, Cecil Gock, who was secretary of the company, that if he liked to carry on business that way he, Gock Chew, would not do so. The date shows that a fourth transaction must have taken place, and the observation coupled with the facts of the case, particularly the payment of a substantial sum in cash for each delivery, indicates that a course of business existed. The smuggled cigarette papers were quickly sold by the defendant company, and customs duty upon them has never been paid. In the judgment under appeal, *Starke J.* has held that it must be paid by the defendant company.

In support of the company's appeal from that decision, it is contended that the dealings with the goods exposed the company to no civil liability to the Crown for the duty; at worst, it rendered itself liable for a penalty for having smuggled goods in its possession, an offence for which it has been convicted in respect of each of the three transactions. Sec. 153 of the *Customs Act* 1901-1935 provides that all duties shall constitute Crown debts charged upon the goods in respect of which the same are payable and payable by the owner of the goods and recoverable at any time in any court of competent jurisdiction by proceedings in the name of the collector. Unfortunately the provision does not say at what time "ownership" must exist to bring about liability. Consistently with the terms of the provision, the "owner" in the statutory sense who is to pay may be the "owner" at the time of the importation, or the owner for the time being, or each successive owner from and at the time of importation until the duty is paid or the goods are entered for

home consumption. "Owner" is defined by sec. 4 to include "any person (other than an officer of customs) being or holding himself out to be the owner, importer, exporter, consignee, agent, or person possessed of, or beneficially interested in, or having any control of, or power of disposition over the goods."

The appeal was argued as if its determination required us to decide as a general proposition whether a liability to pay customs duty falls upon a person who, having no part in the introduction into Australia of the goods, obtains property or possession by a transaction either with the smuggler or someone claiming under him taking place after the smuggling is complete.

Further, the argument appeared to involve the view that if such a person was liable for the duty, it could make no difference that he was a bona fide purchaser for value, so long as the goods remained in point of law subject to, that is, liable to, the control of the customs, because they had not been entered for home consumption.

I think that the facts I have stated raise a narrower question. It is evident that some connection existed between the defendant company and the importation of the goods. It is not possible to say exactly what the relation was. The defendant may have given a specific order for the goods, or it may be that the company had done no more than raise a reasonable expectation that if such goods were brought to them, having escaped duty, then they would buy them. But it is sufficiently plain that under some understanding the goods were brought to the defendant company uncustomed and that they were at once resold, all with the intention of defeating the revenue. The duties in respect of the goods so dealt with are declared by sec. 153 to be Crown debts charged upon the goods in respect of which the same are payable. The goods were still legally subject to the control of the customs, that is, liable in law to the exercise of physical control by the officers of the revenue and to be dealt with so as to insure payment of the duty. The goods were the subject of forfeiture and sale, and, in the event of any sale by the collector, the proceeds would have been applied in payment of the duty. When sec. 153 charges the duty upon the goods, it means, I think, to impose a specific charge upon the goods which

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In the present case the defendant company acted with the intention of defeating the charge and realized the goods and pocketed the proceeds, except as to forty-one packets seized by the customs. Without entering upon any wider question as to the meaning and extent of the application of the provision that the duty shall be payable by the owner, it appears to me that it at least means that, after the charge has attached, every person whose title to the goods is subject to the charge shall be liable to pay the debt and cannot defeat the liability by selling the goods and applying the proceeds to his own use.

For these reasons I think the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *Harold F. James.*

Solicitor for the respondent, *H. F. E. Whitlam*, Commonwealth Crown Solicitor.

J. B.