

[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

BREWER.

Secret Commission—Agent—Person serving under the Crown—Person who has so served but is no longer serving—Secret Commissions Act 1905 (No. 10 of 1905), secs. 2, 3, 4.**

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The definition of “agent” in sec. 3 of the *Secret Commissions Act* 1905 does not include a person who has served, but is no longer serving, under the Crown. Therefore the giving of a secret gift to such a person as a reward for having aided to obtain a contract with the Crown is not an offence under sec. 4 of the Act.

SYDNEY,
Nov. 30;
Dec. 1, 7.
Latham C.J.,
Rich and
McTiernan JJ.

So held by Latham C.J. and McTiernan J. (Rich J. dissenting).

CASE STATED.

Upon the trial in the High Court of Mervyn MacPherson Brewer for an offence against the Commonwealth *Secret Commissions Act* 1905, the jury returned a verdict of guilty, whereupon the trial judge (Starke J.) reserved judgment and, pursuant to sec. 72 of the *Judiciary Act* 1903-1940, reserved certain questions of law for the consideration of the Full Court of the High Court.

The following statement of facts is substantially as it appears in the case stated by his Honour.

* The *Secret Commissions Act* 1905 provides as follows:—Sec. 3: “In this Act—‘Agent’ includes any corporation, firm, or person employed by or acting or having been acting or desiring or intending to act for or on behalf of any other corporation, firm, or person, whether as agent, partner, factor, broker, servant, trustee, director, or in any other capacity, and whether he acts in the name of the principal or in any other name, and in the case of a firm includes a member of the

firm. It also includes a person serving under the Crown.” Sec. 4: “(1) Any person who, without the full knowledge and consent of the principal, directly or indirectly . . . (b) gives or agrees to give or offers to an agent of the principal . . . any gift or consideration as an inducement or reward— . . . (II) for . . . having aided to obtain for any person an agency or contract for or with the principal shall be guilty of an indictable offence.”

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Mervyn MacPherson Brewer was charged on indictment which, as amended, alleged that on or about 2nd July 1941, at Melbourne, he did contrary to the *Secret Commissions Act* 1905 give to one William Ronald Ritchie an agent within the meaning of the Act to wit a person serving under the Crown namely in the Australian Defence Canteens Service Central Control without the full knowledge and consent of the Crown a gift to wit the sum of £450 as a reward for having aided to obtain for MacRobertson Pty. Ltd. certain contracts for the purchase and sale of confectionery with the Crown namely with the Australian Defence Canteens Service Central Control.

The contracts were based upon fifty orders given by the Australian Defence Canteens Service Central Control to MacRobertson Pty. Ltd. between 3rd November 1940 and 2nd April 1941 inclusive. The orders were signed by Ritchie thus:—"For Australian Defence Canteens Service, Central Control, W. R. Ritchie." Brewer was the assistant managing director of MacRobertson Pty. Ltd.

Brewer pleaded "not guilty."

In January 1940 an Army Canteens Service was organized by the Department of the Army or the responsible Minister for the time being for the Army, amongst other things to take over all army canteens in the Commonwealth and various appointments to it were approved by the Military Board in Australian Army Order No. 152 of 15th June 1940. The service was known as the Australian Defence Canteens Service. It had a Central Control and in each State there was a District Canteens Board. The personnel of the Central Control and the various Boards consisted of civilians, who acted in a voluntary capacity, and army officers drawn principally from the reserve of officers. The Central Control operated under the Military Board (Quartermaster-General). It consisted of a Controller of Canteens and an Assistant Controller who were civilians acting in an honorary capacity, and a Director of Canteens Service who was a militia officer with business experience called up for duty on the Quartermaster-General's staff. In each State there was a Staff Officer of Canteens Service with the status of militia officer called up for duty, who acted as secretary of the District Canteens Committee. The executive managerial functions in each military district were vested in a Deputy Controller, who was a representative citizen acting in an honorary capacity and who was supported by the Staff Officer of Canteens Service.

In August 1940 Canteens Service Regulations (Statutory Rules 1940 No. 183) were made. The Canteens Service so organized and regulated was for the supply of goods and refreshments to and for

the entertainment and recreation of the members of the forces and for such other purposes as the Military Board directed. Funds were advanced to the Canteens Service from the drawing account of the Department of the Army for the purchase of stock and to meet other expenses. The funds so advanced were by way of grant as a temporary loan to the Canteens Service. The Canteens Service supplied goods and refreshments to members of the forces for cash. These sales in the canteens resulted in profits, some part of which was distributed and the other part reserved, as an ordinary trading concern, for the purpose of financing extended operations. No part of such profits was paid into consolidated revenue. Prior to the passing of the Canteens Service Regulations referred to above, that is to say, on 13th March 1940, William Ronald Ritchie had been appointed assistant purchasing officer in the Canteens Service by the Director of Canteens Service and he acted as assistant purchasing officer from the time of his appointment until he was dismissed from the Service on 17th April 1941.

On 2nd July 1941 a sum of £450 was paid by Brewer to Ritchie. This was the sum Brewer was charged by the indictment with having given to Ritchie for having aided to obtain for MacRobertson Pty. Ltd. certain contracts for the purchase and sale of confectionery.

In a long statement made in writing by Brewer and put in evidence by the prosecution Brewer stated, *inter alia*, that before and after Ritchie had been dismissed from his appointment he asked Brewer for a sum of £450 in respect of commission on certain orders said to have been secured for MacRobertson Pty. Ltd. by Ritchie. Brewer consistently refused the request. Later, however, a Canteens Service officer told Brewer that the chocolates of MacRobertson Pty. Ltd. had been adversely reported on overseas. Two days later, on 2nd July 1941, Ritchie mentioned to Brewer the matter of the report and intimated that although he was no longer employed by the Canteens Service he was still in a position to affect adversely the business of MacRobertson Pty. Ltd. and he hinted that there would be more adverse reports if his claim for commission was not met. Ritchie told Brewer that that would be the firm's last chance to meet his demand for commission, that great harm would be done to the firm's business if it were refused, and that if the sum of £450 were paid there would be no more adverse reports on the firm's chocolates. Brewer told Ritchie that the firm did not want any further orders, and that the firm's raw material position was such that the firm's policy was to concentrate entirely on the local demand. Brewer told Ritchie that to get rid of him and his alleged claim and to prevent the firm's goodwill being further damaged,

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he, Brewer, would pay to Ritchie the sum of £450 provided he signed a receipt which acknowledged that he would do nothing further to harm the firm, and that he would not in any way concern himself with the firm's business in the future. Ritchie said that he would agree to these terms, but would not sign anything. Brewer then paid Ritchie the sum of £450 in cash, believing he was no longer connected with the Canteens Service and to prevent him carrying out his threat to use his personal influence to damage the firm's reputation by procuring untrue adverse reports from overseas on its goods. He had not seen or heard of Ritchie since that date. He regarded Ritchie's claim purely as blackmail.

At the close of the case for the prosecution Brewer's counsel submitted that Ritchie was not at the time of the payment to him of the said sum of £450 a person serving under the Crown within the meaning of the *Secret Commissions Act* 1905, and had in fact been dismissed from the Canteens Service. Counsel therefore contended that the charge as laid could not be supported. Counsel also submitted that Ritchie was not an agent or a person serving under the Crown by reason of his service in the Australian Defence Canteens Service Central Control.

Both submissions were overruled by *Starke J.*

Brewer did not call any evidence.

In his charge to the jury his Honour, so far as is material to this report, directed the jurors as follows:—"A person serving under the Crown does not mean a person personally serving the King but it means all those persons engaged in the public service of the Crown which is organized in various departments and various services. . . . In my opinion, gentlemen, and for the purposes of to-day, I direct you that the Australian Defence Canteens Service is one of those services . . . Reading part of the present Canteens Regulations . . . it is organized under the *Defence Act* 'for the supply of goods and refreshments to, and for the entertainment and recreation of, the members of the Forces, and for such other purposes as the Military Board directs' . . . It seems to me—and I must tell you as a matter of law—that that Service was organized and was constituted as and that its functions were a service of the Crown and that anybody engaged in the Service was serving under the Crown . . . The words 'a person serving under the Crown' are, I think, descriptive of the class of persons brought within the expression 'agent' in the Act. An agent includes not only a person employed by or acting for or on behalf of another person, but also a person acting or having been acting for or on behalf of any other person. A person serving under the Crown is included in the

expression 'agent' and in my direction to you he is included in the extended meaning of that expression as used in the Act. Accordingly I direct you as a matter of law that the Act upon its proper construction includes not only gifts to persons serving under the Crown at the time of the gift but also gifts whenever made to persons who had been serving under the Crown, or, to use the words of the Act, 'having been acting' as a servant of the Crown as a reward for having aided or helped to obtain for any person or corporation a contract from the Crown. That is to say that the extended meaning of 'agent' includes any person serving under the Crown who is actually employed by the Crown at the time of the gift, and any person who 'having been acting' as a servant of the Crown at whatever time the gift is made."

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The jury found Brewer guilty upon the indictment.

Judgment was reserved, and Brewer was admitted to bail upon condition that he surrendered for judgment when required and that proceedings were taken by way of case reserved or appeal within fourteen days and prosecuted with expedition.

The questions of law arising on the trial of Brewer which *Starke J.*, acting in the exercise of his discretion under sec. 72 of the *Judiciary Act* 1903-1940, reserved for the consideration of the Full Court were :

1. Whether William Ronald Ritchie was an agent within the meaning of sec. 3 of the *Secret Commissions Act* 1905 to wit a person serving under the Crown at the time of the payment of the said sum of £450 to the said Ritchie.

2. Whether the orders for confectionery supplies signed by Ritchie accepted and executed by MacRobertson Pty. Ltd. and for which supplies the Australian Defence Canteens Service Central Control paid were contracts for the purchase and sale of confectionery with the Crown, namely, with the Australian Defence Canteens Service Central Control as laid in the indictment.

3. Whether William Ronald Ritchie was, within the meaning of sec. 3 of the *Secret Commissions Act* 1905, an agent, namely, a person serving under the Crown, by reason of his services in the Australian Defence Canteens Service Central Control.

4. Whether his Honour's direction to the jury in respect of the matters aforesaid was correct in law.

Relevant statutory provisions and regulations made thereunder are sufficiently set forth in the judgments hereunder.

Windeyer K.C. and *Menzies K.C.* (with them *Stanley Lewis*), for the accused.

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Menzies K.C. If the charge was that of having given something to an agent of the Commonwealth, then the charge would fail, because such a person is not within the Act, the Commonwealth being neither a "person," nor a "firm," nor a "corporation" within the meaning of sec. 3 of the *Secret Commissions Act* 1905 (*The Commonwealth v. Baume* (1)). It is significant that *The Commonwealth v. Baume* (2) was decided a few months prior to the passing of the *Secret Commissions Act* 1905. The Commonwealth is a juristic person only as the Crown in right of the Commonwealth: See *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.* (3). There is no general power in the Commonwealth to pass an Act involving the creation of a crime. The words "employed by or acting or having been acting" in sec. 3 cannot, on any interpretation, apply to an agent of the Commonwealth, and can only apply to a person serving under the Crown by an entirely strained construction of the definition. On the face of sec. 3, as a matter of language, there is a sharp distinction between employment by a corporation, firm or person and employment under the Crown. In the former case the words used cover past, present and future, but the reference made to the inclusion of a person serving under the Crown discloses a sharp distinction of language. That distinction connotes a person presently serving and is grammatically entirely clear. The words used must not be strained on any notion that there has been a slip, or a *casus omissus*, or that the thing charged is so clearly within the mischief that it must have been intended to be included and would have been included if thought of (*Dyke v. Elliott* (4)). Upon the proper construction of sec. 4 apart from the definition of "agent" in sec. 3, inevitably the prosecution would have to establish that the gift and the agency were contemporaneous. The language of the Act has made a vital distinction. The offence alleged against the accused is in relation to a payment to a person serving under the Crown. The prosecution has failed to prove that. In the absence of the definition of the word "agent" in sec. 3 reading "it also includes a person having served under the Crown," the prosecution cannot succeed on the facts proved. Sec. 4 clearly does not cover the case where the alleged recipient of the gift was not an agent at the time of the gift. In effect the definition of "agent" in sec. 3 should be read as being divided into two sub-sections, the first sub-section consisting of the first sentence and the second sub-section consisting of the second sentence. The word "serving" in the second sentence is the present

(1) (1905) 2 C.L.R. 405, at p. 418.
 (2) (1905) 2 C.L.R. 405.

(3) (1920) 28 C.L.R. 129.
 (4) (1872) L.R. 4 P.C. 184, at p. 191.

participle of the word "serve." It connotes the present, not the past. H. C. OF A.
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[McTIERNAN J. referred to *Public Works Commissioners v. Pontypridd Masonic Hall Co. Ltd.* (1) and *New South Wales v. Bardolph* (2).]

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Neither the Central Control nor any of its members had any authority under the Regulations to buy or sell, or to enter into contracts for the purchase and supply of articles, nor had it or any of such members any authority to authorize Ritchie to do any of those things. These powers and duties were vested in the various District Canteens Boards. Ritchie was not an employee of any District Canteens Board. It does not follow that because the Canteens Service comes into close contact with the military organization, that is to say it is administered and supervised by the Quartermaster-General, and that regulations therefor are made, the Canteens Service becomes a Crown body or instrumentality. The documents put in evidence and any action performed by Ritchie do not produce the technical result that Ritchie was a person serving under the Crown. The employment of Ritchie was not authorized by the Governor-General under sec. 63 of the *Defence Act* 1903-1941 (*The Commonwealth v. Colonial Ammunition Co. Ltd.* (3)). The prosecution does not suggest there was a sanctioning by the Governor-General, therefore the question dealt with in *Attorney-General (Vict.) v. The Commonwealth* (4) does not arise. In that case the parties were concerned with questions of constitutional power, and all that was before the Court was that the functions of the particular factory had been extended.

[McTIERNAN J. referred to *The King v. Hush*; *Ex parte Devanny* (5).]

The contracts entered into by the accused's firm were not contracts with the Crown. How far an institution like the Canteens Service is to be regarded as the Crown was dealt with in *Gilbert v. Corporation of Trinity House* (6), *Fox v. Government of Newfoundland* (7), *Metropolitan Meat Industry Board v. Sheedy* (8) and *Heiner v. Scott* (9). The term "Commonwealth" is merely a compendious expression which means the Crown in right of the Commonwealth (*The Commonwealth v. Miller* (10); *The King v. Murray and Cormie*; *Ex parte The Commonwealth* (11)). The Canteens Service is, no doubt, a product of Commonwealth activity, but it is not the Crown in right

(1) (1920) 2 K.B. 233, at pp. 234, 235.

(8) (1927) A.C. 899.

(2) (1934) 52 C.L.R. 455, at p. 518.

(9) (1914) 19 C.L.R. 381, at pp. 393-402.

(3) (1924) 34 C.L.R. 198, at p. 220.

(4) (1935) 52 C.L.R. 533, at p. 565.

(10) (1910) 10 C.L.R. 742, at pp. 753, 754.

(5) (1932) 48 C.L.R. 487.

(6) (1886) 17 Q.B.D. 795.

(11) (1916) 22 C.L.R. 437, at p. 455.

(7) (1898) A.C. 667.

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of the Commonwealth (*Federated Municipal and Shire Council Employees' Union of Australia v. Melbourne Corporation* (1)).

[LATHAM C.J. referred to *The Commonwealth v. New South Wales* (2) and *Hillman v. The Commonwealth* (3).]

It is quite true that there is a measure of control by the Quartermaster-General, who is portion of the Defence Department. What, however, is controlled is operations conducted by persons specially named to control them. Those operations, being carried on in the way of buying and selling goods for profit with funds which are distinct from the funds of the Government and which have no relation to consolidated revenue, with provision for profit and loss account and for distribution outside the area of government finance altogether, do not constitute a department of the Crown. The trial of the issues was at an end when the verdict was given, therefore this Court is unable to amend the indictment (*R. v. Dossi* (4)). The questions reserved should be answered in the negative. This Court should, under the powers conferred by sec. 73 (b) and (f) of the *Judiciary Act* 1903-1940, set aside the verdict and order a verdict of not guilty to be entered.

Shand (with him *Fazio*), for the Crown. At the time of the gift Ritchie was a "person serving under the Crown" in the sense that he was an agent, that term embracing the fact that he had been acting in the past. The phrase "a person serving under the Crown" is a descriptive phrase, and is not limited to the present tense "serving." That phrase refers back to the term "agent." Any other interpretation would do violence to the language used in the Act, particularly the definition in sec. 3 of the word "principal," because "principal" includes a person for whom the agent acts, has been acting, or desires or intends to act, and in conjunction with the operative clause includes all agents who acted in the past. The words of the Act mean exactly what, grammatically and properly construed, they say, and what the Act obviously intended. When the recipient is a person serving under the Crown that relates back to agent, he is an agent, in other words, with all the significance of that term as defined. As regards the definition in sec. 3 of the word "agent," a precisely similar argument applies to a member of a firm as applies to a servant of the Crown. The obvious solution is that all the various persons mentioned are to be taken as agents and to carry all the significant features of an agent as defined. The words

(1) (1919) 26 C.L.R. 508, at p. 541.

(2) (1923) 32 C.L.R. 200, at p. 221.

(3) (1924) 35 C.L.R. 260.

(4) (1918) 34 T.L.R. 498 ; 13 Cr. App. R. 158.

“whether he acts” in that definition are present tense. If they are to be construed in the strictest sense as the present tense in conformity with the argument on behalf of the accused, it would not be possible to relate “having been acting,” &c., set forth near the commencement of the definition. It is clearly comprehended in sec. 2, and it is in accordance with fact, that there is no difference between the “Crown” and the “Commonwealth.” Assuming, however, that there is a difference, the word “agent,” apart from the latter part of the definition, is appropriate to describe the relations between the Crown and a person acting in that capacity. “Crown agent” is an appropriate term (*Public Works Commissioners v. Pontypridd Masonic Hall Co. Ltd.* (1)). A distinction should be drawn between a servant of the Crown and a servant under the Crown (*Marrow v. Flimby and Broughton Moor Coal and Fire Brick Co. Ltd.* (2)); therefore a person may fall within the definition although he is a servant of someone other than the Crown. A person serving under the Crown is an agent, and an agent is a person who has been acting. He is a person who has applied to him certain *de facto* actions, either past, present or future. The word “principal” is sufficient to meet the present case, even though it may be necessary to refer back to the word “agent.” “Serving under the Crown” is not “in the service of the Crown.” Agency is an appropriate term to describe relations between the Crown and someone ordinarily in that capacity. Therefore, if in fact Ritchie was an agent of the Crown, then without more he comes within the definition, and the later words in the definition are explained by the desire to provide for a person serving indirectly under the Crown. Sec. 2 is itself sufficient to embrace the facts in this case. The evidence establishes that Ritchie did in fact act as an agent. All that the Act requires is a *de facto* service. The Act is intended to relate to *de facto* agency, and so relating it does not concern the Court to inquire whether there was evidence of a due appointment with the approval of the Governor-General under sec. 63 of the *Defence Act*. Ritchie was in fact acting within the terms of the Act. He was properly employed. A presumption of authorization under sec. 63 of the *Defence Act* arises from the fact that his actions were recognized and acted upon by the Central Control of the Canteens Service (*R. v. Roberts* (3); *Doe d. Bowley v. Barnes* (4)). This point was not specifically raised in the Court below, and can be cured by evidence (*Kidman v. The Commonwealth* (5)). *The Commonwealth v. Colonial Ammunition Co. Ltd.* (6) is distinguishable.

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(1) (1920) 2 K.B. 233.

(2) (1898) 2 Q.B. 588, at pp. 597, 601, 602.

(3) (1878) 14 Cox C.C. 101.

(4) (1846) 8 Q.B. 1037 [115 E.R. 1164].

(5) (1925) 37 C.L.R. 233, at p. 249.

(6) (1924) 34 C.L.R. 198.

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In that case the only powers under the *Defence Act* to establish the factory concerned and to take over the staff thereof were the powers conferred upon the Governor-General by sec. 63 (1) (d) and (db) of that Act. The Regulations, which were assented to by the Governor-General, empowered the Quartermaster-General to employ civilians. By the combined effect of sec. 28 and sec. 124 of the *Defence Act* this authorization must be deemed to have had the Governor-General's approval. The Court should give effect to the intention of the Act (*R. v. Lyons* (1)).

[McTIERNAN J. referred to *Coe v. Lawrance* (2).]

Effect can be given to the intention of the Act without doing violence to the words used. It may be that some of the words in the indictment were unnecessary. If so, they were mere surplusage (*White v. The King* (3); *R. v. Wright* (4); *R. v. Madercine* (5)), and did not prejudice the accused. For the purposes of the Act the Canteens Service was "the Crown" or "the Commonwealth" (*Repatriation Commission v. Kirkland* (6)). The questions reserved for the Court should be answered in the affirmative.

Menzies K.C., in reply. The periods of employment and conditions thereof of persons in the Canteens Service were not prescribed by the *Defence Act* or the regulations made thereunder as required by sec. 9 of the *Acts Interpretation Act* 1904-1937. The documents in evidence clearly show that Ritchie was not appointed by virtue of sec. 63 (2) of the *Defence Act* and that he was appointed without authority. A person "serving under the Crown" is one who was serving currently at the time when the alleged offence was committed. The decision in *Marrow v. Flimby and Broughton Moor Coal and Fire Brick Co. Ltd.* (7) must be read subject to the decision in *Richards v. Wrexham and Acton Collieries Ltd.* (8).

Cur. adv. vult.

Dec. 7.

The following written judgments were delivered:—

LATHAM C.J. AND McTIERNAN J. Questions of law reserved pursuant to the *Judiciary Act* 1903-1940, sec. 72, on the trial of Mervyn MacPherson Brewer for an offence against the *Secret Commissions Act* 1905 of the Commonwealth.

- (1) (1858) Bell's C.C. 38, at p. 45.
- (2) (1853) 1 E. & B. 516, at p. 520
[118 E.R. 529, at p. 530].
- (3) (1906) 4 C.L.R. 152.
- (4) (1871) 2 V.R. (L.) 204.

- (5) (1899) 20 L.R. (N.S.W.) 36; 15 W.N. 235.
- (6) (1923) 32 C.L.R. 1.
- (7) (1898) 2 Q.B. 588.
- (8) (1914) 2 K.B. 497.

Brewer was charged upon an indictment which, as amended, was as follows: "That on or about the second day of July in the year One thousand nine hundred and forty-one at Melbourne in the Central Bailiwick of the State of Victoria Mervyn MacPherson Brewer of 1 Henderson Avenue Malvern in the said State did contrary to the *Secret Commissions Act* 1905 of the Commonwealth of Australia give to one William Ronald Ritchie an Agent within the meaning of the said Act to wit a person serving under the Crown namely in the Australian Defence Canteens Service Central Control without the full knowledge and consent of the Crown a gift to wit the sum of Four hundred and fifty pounds (£450) as a reward for having aided to obtain for MacRobertson Proprietary Limited certain contracts for the purchase and sale of confectionery with the Crown namely with the Australian Defence Canteens Service Central Control."

The accused pleaded not guilty.

The case states that one Ritchie was, prior to 27th August 1940, the date of the passing of the Canteens Service Regulations (Statutory Rules 1940 No. 183), appointed assistant purchasing officer in the Australian Defence Canteens Service. He acted as such officer until he was dismissed on 17th April 1941. As such officer he gave written orders for confectionery to, *inter alios*, MacRobertson Pty. Ltd., and the company supplied goods to the Canteens Service Central Control in accordance with such orders. On 2nd July 1941 the accused Brewer, who was the assistant managing director of MacRobertson Pty. Ltd., paid a sum of £450 to Ritchie. The indictment alleged that this sum was given by Brewer to Ritchie for having aided to obtain for the company certain contracts for the supply of confectionery by the company to the Canteens Service. Counsel for the accused contended that, as Ritchie had been dismissed from his employment at the time when the money was paid to him, he was not at that time "a person serving under the Crown", and that therefore the evidence failed to support the charge as laid. It was further contended that Ritchie was not, by reason of his service in the Canteens Service, an agent as being a "person serving under the Crown" within the meaning of the *Secret Commissions Act* 1905. The learned trial judge (*Starke J.*) overruled these submissions. The accused called no evidence. The jury was directed to the effect that, within the meaning of the Act and of the indictment, Ritchie was a person serving under the Crown at the time of the payment of the money to him. The jury entered a verdict of guilty. The learned trial judge reserved judgment and stated this case.

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The charge was laid under sec. 4 of the *Secret Commissions Act* 1905. That section, so far as relevant, is as follows :—“ Any person who, without the full knowledge and consent of the principal, directly or indirectly . . . gives . . . to an agent of the principal . . . any gift . . . as . . . a reward . . . for . . . having aided to obtain for any person . . . a contract . . . with the principal shall be guilty of an indictable offence.”

Sec. 2 of the Act is as follows :—“ This Act applies to trade and commerce with other countries and among the States, and to agencies of and contracts with the Commonwealth or any Department or officer thereof.”

Sec. 3 contains the following provisions :—“ ‘ Agent ’ includes any corporation, firm, or person employed by or acting or having been acting or desiring or intending to act for or on behalf of any other corporation, firm, or person, whether as agent, partner, factor, broker, servant, trustee, director, or in any other capacity, and whether he acts in the name of the principal or in any other name, and in the case of a firm includes a member of the firm. It also includes a person serving under the Crown.

‘ Agency ’ has a meaning corresponding with that of ‘ agent.’

‘ Principal ’ includes a corporation, firm, or person who employs the agent or for or on behalf of whom the agent acts or has been acting or desires or intends to act.”

The questions reserved in this case relate to the allegations in the indictment (1) that Ritchie was “ an Agent within the meaning of the said Act to wit a person serving under the Crown namely in the Australian Defence Canteens Service Central Control,” and (2) that the contracts that he aided in obtaining were contracts “ with the Crown namely with the Australian Defence Canteens Service Central Control.”

The questions for consideration may conveniently be arranged under three heads :—

(1) Was the Canteens Service a branch or department of the Government or an independent body ? The answer to this question will determine whether, if Ritchie was serving in that Service, he was therefore serving under the Crown and also whether the contracts in question were contracts with the Crown.

(2) Was Ritchie at any time serving in that Service ?

(3) If yes to (2), does the fact that he was dismissed from the Service before the money was paid to him by Brewer prevent him from being an agent within the meaning of the Act at the time when the money was so paid ?

Question No. 1.—The Canteens Service has at all relevant times been organized under the Quartermaster-General within the Defence Department or the Department of the Army : See Statutory Rules 1939 No. 115, reg. 30, which provides, *inter alia*, that, “subject to any direction which may, from time to time, be given by the Minister” (for Defence), the Quartermaster-General shall be responsible for “Canteen Services . . . and the Administration and Mobilization of Departments or Services” dealing with that matter. In this regulation the Canteens Service is treated in exactly the same way as all the other many branches of military activity and administration.

The organization of the Canteens Service was developed and extended during 1940, and an order of the Military Board, dated 15th June 1940, sets out the names of various persons, civilian and military, appointed to the Central Control and to District Controls of the Service.

The *Defence Act* 1903-1941, sec. 124 (o), authorizes the Governor-General to make regulations prescribing matters providing for and in relation to “the establishment and conduct of canteens.” Such regulations were made by Statutory Rules 1940 No. 183 (27th August 1940). They provide that the Military Board may authorize the establishment in Australia of a Canteens Service for the supply of goods and refreshments to, and for the entertainment and recreation of, the members of the Forces, and for such other purposes as the Military Board directs. The Service is to be under the general control of the Quartermaster-General (reg. 781B). The Minister may appoint a Controller-General (reg. 781C), an Assistant Controller-General (reg. 781D), and Controllers in each Military District (reg. 781E). The functions of these officers are prescribed. The Military Board may appoint an officer of the Quartermaster-General’s Branch at Army Headquarters to be Director of the Canteens Service. District Canteens Boards may also be established. The Controller-General and Assistant Controller-General are honorary officers (reg. 781T).

The Canteens Service, therefore, is part of the department of a Minister for which the Quartermaster-General is responsible. The controlling officers of the Service are appointed by the Minister, and the Director is appointed by the Military Board. Such an establishment must be held to be simply a part of a Government department. It is not an independent organization exercising discretionary powers independent of Government control (*Repatriation Commission v. Kirkland* (1)). It is quite different in character from the Red

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(1) (1923) 32 C.L.R., at pp. 6, 7.

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Cross or Comforts Funds—which are voluntary organizations the officers of which are not appointed by the Government and the activities of which are not managed by persons responsible to the Government.

Attention was called to the fact that the regulations (Statutory Rules 1940 No. 183) provide for the payment of moneys received in canteens or otherwise into the Commonwealth Bank or Commonwealth Savings Bank—instead of into consolidated revenue: see sec. 81 of the Constitution (reg. 781P). They also provide for audit of funds by a public accountant (not by the Auditor-General) (reg. 781Q), and for disposal of profits of the Service (regs. 781R and 781S). These provisions, however, do not displace the governmental control of the activities of the Service which is recognized and established by the regulations to which reference has been made. Nor does the utilization of the services of civilians in an honorary capacity alter the character of the Service. A canteens service might have been organized under the control of contractors with the Government. The employees of such contractors would have been their servants and would not have been serving under the Crown. But this course has not been followed.

We are, therefore, of opinion that the Canteens Service is in the fullest sense part of a Government department; that service therein is service under the Crown; and that the contracts which in fact were made between MacRobertson Pty. Ltd. and the Canteens Service were contracts with the Crown.

Question No. 2.—Power to make appointments of persons to serve in a civil capacity with the Defence Department may be conferred under the *Defence Act* 1903-1941, sec. 63. The evidence is that, before the making of Statutory Rules 1940 No. 183, Ritchie was appointed an assistant purchasing officer in the Central Control by Lieutenant-Colonel (then Major) Hosking, who was then and thereafter till his death in 1942 Director of Canteens Service. Ritchie acted in that capacity until he was dismissed on 17th April 1941. He so acted both before and after the making of Statutory Rules 1940 No. 183. Acting in a public office is evidence of due appointment to that office, not only in civil proceedings but also in a criminal case (*R. v. Lawson* (1)). The presumption that his appointment was duly made is not met by any rebutting evidence: Cf. *Jenkin v. Attorney-General of Victoria* (2). The conclusion, therefore, is that Ritchie was appointed to serve in the Canteens Service and that his service therein was service under the Crown.

(1) (1905) 1 K.B. 541.

(2) (1921) V.L.R. 79, at p. 88.

Question No. 3.—Ritchie was dismissed from the Service before 2nd July 1941, when the money in question was paid to him by the accused Brewer. Ritchie was therefore not actually then a person serving under the Crown, and it is argued for the accused that Ritchie therefore was not, at the relevant time, an agent of the Crown. If this is the case, the proof of a material allegation in the indictment has failed. The prosecution relies, in reply to this contention, upon the definition of “agent” in the Act, urging that as “agent” includes a person “having been acting” for another person, so “person serving under the Crown” (also included in the definition of “agent”) includes a person who has served but is no longer serving under the Crown.

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The Act is directed against the taking of secret commissions by agents—i.e., the taking of commissions unknown to their principals. The simplest case of such dishonesty is to be found in the taking of such a commission during the currency of the agency. But it was considered that criminal liability should not be avoided simply because the relationship of agency had been terminated before the commission was taken, if it was taken secretly as a reward for obtaining or having obtained a contract with a principal. Accordingly “agent” was defined so as to include a person “having been acting” as agent.

The question which arises in the present case is whether this extension of the meaning of “agent” is applicable to the case of a person serving under the Crown who is included in the definition by the final words: “It” (i.e. “agent”) “also includes a person serving under the Crown.”

It may be observed in the first place that, under the indictment as it stands, the case for the prosecution necessarily involves proof of the allegation that Ritchie was, within the meaning of the Act, serving under the Crown. Particulars of the agency alleged were given in the words: “to wit a person serving under the Crown namely in the Australian Defence Canteens Service Central Control.” The prosecutor cannot, in this case, support the charge by ignoring this part of the indictment and by proffering proof based upon the first part of the definition of “agent”: i.e., proof that Ritchie was “a person having acted for another person,” namely, the Crown. But, even if the terms of the indictment did not prevent such proof from being sufficient in this case, the definition of “agent” shows that, as far as the Crown is concerned, agents of the Crown are dealt with only in the second part of the definition and not in the first

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part. The word "person," unless the contrary intention appears, includes "body politic" (*Acts Interpretation Act* 1901-1941, sec. 22) and therefore includes the Commonwealth. But in this case a contrary intention does appear. If the first part of the definition included persons acting for the Crown there would be no reason whatever for the second part relating to persons serving under the Crown, because they would already have been included in the first part. In this connection attention may be directed to the word "also" in the sentence: "It *also* includes a person serving under the Crown." This word shows that it is intended by the second part of the definition to include persons who have not been included by the first part.

But it is argued for the prosecution that the second part of the definition of "agent" should in some manner be combined with the first part, so that "person serving under the Crown" should be construed as including "person who has been serving under the Crown," just as in the first part of the definition "agent" includes not only a person who is acting as agent but a person "having been" so acting. It is not, in our opinion, possible to combine the two parts of the definition in this way. The definition may be read as providing that "agent" shall include (a) past, present, and what may be called intending or desiring agents, and (b) also persons serving under the Crown. As a matter of construction it is not possible to introduce into (b) the words referring to past and future which are found in (a) but which are conspicuously absent in (b). If a term V is defined to "include" W, X, Y, and also Z, that does not mean either that Z is thereby defined to include either W or X or Y or that attributes attached to W or X or Y are to be deemed to be attached to Z.

If it were permissible to introduce the words of the first part of the definition into the second part the result would be to read the second part as providing that: "It, that is 'agent,' that is any person . . . acting or having been acting or desiring or intending to act for . . . any other person . . . includes a person serving under the Crown." Such a provision, taken as a definition, would be a definition only of "person acting, having been acting, &c." It would not define or explain or extend the meaning of the term "person serving under the Crown." The proposition, "'a person . . . acting or having been acting &c.' includes a person serving under the Crown," is not convertible into the proposition, "'a person serving under the Crown' includes a person . . . acting or having been acting &c."

Thus the Act contains no definition ("inclusive" or other) of "person serving under the Crown." These words can be given only their natural meaning. They cannot be interpreted so as to include persons who have in the past so served or persons who intend or desire in the future so to serve. Sec. 2 makes it clear, as also does the second part of the definition of "agent," that the Act is to apply to agents of the Commonwealth. "Principal" is defined by reference to "agent" and with a corresponding amplitude. But the definition of "agent" omits to give any extended meaning to the word in the case of persons who are alleged to be agents because and only because they are serving under the Crown. This may be due to a slip in drafting, but the Court must take the Act as it finds it and must not endeavour, more particularly in a criminal matter, to amend defects by a process of interpretation benevolent to the Crown but disadvantageous to an accused person.

As *Wright J.* said in *London County Council v. Aylesbury Dairy Co. Ltd.* (1) quoting from *In re Sneezum; Ex parte Davis* (2): "That is a provision which might perhaps be very properly made by the legislature; but, to my mind, to insert it in this way by implication would not be to construe the Act of Parliament, but to alter it; it might be to improve it, according to the view which some persons take of the matter, but it would certainly be altering the Act of Parliament, and enlarging still further the provisions which the legislature has thought fit to make with respect to such contracts." *Wright J.* continued: "I am the more strongly driven to this conclusion because the proceeding here is penal, involving penal consequences, and without making the alteration in sec. 14 which we are asked to make, it could not be prosecuted at all. I have certainly always understood the rule to be that where there is an enactment which may entail penal consequences, you ought not to do violence to its language in order to bring people within it, but ought rather to take care that no-one is brought within it who is not brought within it in express language. I am of opinion that the learned magistrate was right, and that if there be mischief consequent upon the ruling which we are bound to give, that mischief is something which must be removed by application to Parliament." This pronouncement of *Wright J.* was approved by eight judges in *R. v. Norman* (3).

The evidence does not show that *Ritchie* was a person serving under the Crown on 2nd July 1941, when *Brewer* paid the sum of

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(1) (1898) 1 Q.B. 106, at p. 109.

(2) (1876) 3 Ch. D. 463, at p. 472.

(3) (1924) 2 K.B. 315, at p. 323.

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We set out the questions asked and the answers which in our opinion should be given to them :—

Question 1. Whether William Ronald Ritchie was an agent within the meaning of sec. 3 of the *Secret Commissions Act* 1905 to wit a person serving under the Crown at the time of the payment of the said sum of £450 to the said Ritchie. *Answer* : No.

Question 2. Whether the orders for confectionery supplies signed by Ritchie accepted and executed by MacRobertson Pty. Ltd. and for which supplies the Australian Defence Canteens Service Central Control paid were contracts for the purchase and sale of confectionery with the Crown, namely, with the Australian Defence Canteens Service Central Control as laid in the indictment. *Answer* : Yes.

Question 3. Whether William Ronald Ritchie was, within the meaning of sec. 3 of the *Secret Commissions Act* 1905, an agent, namely, a person serving under the Crown, by reason of his services in the Australian Defence Canteens Service Central Control. *Answer* : He was not such an agent at the time of the payment mentioned in question 1.

Question 4. Whether my direction to the jury in respect of the matters aforesaid was correct in law. *Answer* : As to the matters referred to in questions 1 and 3 : No. As to the matters referred to in question 2 : Yes.

The questions are answered accordingly. The verdict of guilty is set aside and it is ordered that a verdict of not guilty be entered : See *Judiciary Act* 1903-1940, sec. 73 (b) and (f).

RICH J. This is a case stated upon questions of law reserved in a criminal trial pursuant to sec. 72 of the *Judiciary Act* 1903-1940 as amended. The appellant Brewer was tried upon a charge laid under sec. 4 of the *Secret Commissions Act* 1905. The indictment, as amended by an order dated 11th November 1942, alleged : “ That on or about the second day of July in the year One thousand nine hundred and forty-one at Melbourne in the Central Bailiwick of the State of Victoria Mervyn MacPherson Brewer of 1 Henderson Avenue Malvern in the said State did contrary to the *Secret Commissions Act* 1905 of the Commonwealth of Australia give to one William Ronald Ritchie an Agent within the meaning of the said Act to wit a person serving under the Crown namely in the Australian Defence Canteens Service Central Control without the full knowledge and

consent of the Crown a gift to wit the sum of four hundred and fifty pounds (£450) as a reward for having aided to obtain for MacRobertson Proprietary Limited certain contracts for the purchase and sale of confectionery with the Crown namely with the Australian Defence Canteens Service Central Control."

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The questions of law arising on the trial which have been reserved for the consideration of this Court are the following:—

1. Whether William Ronald Ritchie was an agent within the meaning of sec. 3 of the *Secret Commissions Act* 1905 to wit a person serving under the Crown at the time of the payment of the said sum of £450 to the said Ritchie.

2. Whether the orders for confectionery supplies signed by Ritchie accepted and executed by MacRobertson Pty. Ltd. and for which supplies the Australian Defence Canteens Service Central Control paid were contracts for the purchase and sale of confectionery with the Crown, namely, with the Australian Defence Canteens Service Central Control as laid in the indictment.

3. Whether William Ronald Ritchie was, within the meaning of sec. 3 of the *Secret Commissions Act* 1905, an agent, namely, a person serving under the Crown, by reason of his services in the Australian Defence Canteens Service Central Control.

4. Whether my direction to the jury in respect of the matters aforesaid was correct in law.

The solution of these questions involves primarily the determination of the proper construction of certain provisions of the *Secret Commissions Act* 1905. The Act penalizes the corruption of agents. Sec. 4 makes it an indictable offence for any person to give or offer a secret commission to an agent, and for any person being an agent to accept or obtain or agree or offer to accept or obtain a secret commission from any person. Sec. 3 contains the following provision:—"In this Act 'agent' includes any corporation, firm, or person employed by or acting or having been acting or desiring or intending to act for or on behalf of any other corporation, firm, or person, whether as agent, partner, factor, broker, servant, trustee, director, or in any other capacity, and whether he acts in the name of the principal or in any other name, and in the case of a firm includes a member of the firm. It also includes a person serving under the Crown."

The matter principally relied upon by the appellant is a contention that Ritchie, the alleged agent, having been dismissed from the Canteens Service of the Commonwealth on 17th April 1941, and the

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alleged bribe not having been paid to him by the appellant until 2nd July 1941, he was not a person serving under the Crown at the time when the appellant paid the money, and no offence was therefore committed by the appellant in making the payment.

It is necessary, therefore, to consider the effect of the definition section. It is to be noted that in the relevant part of it the word "includes" is employed. In *Dilworth v. Commissioner of Stamps* (1) it was pointed out by the Privy Council that: "The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word 'include' is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to 'mean and include,' and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions." In the Act now under consideration sec. 3 provides its own dictionary. When "includes" is the sense intended, that word is used, but it is dropped, and the word "means" adopted, when an exhaustive explanation is intended.

It is quite plain from the terms of sec. 3 that an offence is committed under sec. 4 (1) (b) if a person, without the full knowledge and consent of the principal, gives a gift to an agent of the principal in the circumstances mentioned; and it is equally plain that in the case of an agent of a private principal the offence is committed not only if at the time of the gift the donee is still acting as his agent but if he had been so acting in the past although he is his agent no longer. This follows from the phrase "or having been acting" in the first sentence of the definition of "agent." It is contended, however, that the position is different when the Crown is principal. I am unable to appreciate this distinction, which is sought to be based on the second sentence of the definition. It is said that this simply refers to "a person serving under the Crown" and does not repeat the phraseology of the first sentence. But there is no reason why it should. The definition section provides definitions for the purposes of itself as much as for any other part of the

(1) (1899) A.C. 99, at pp. 105, 106.

Act. The first sentence tells us what "agent" is to include. The word "it" in the second sentence must therefore be read in the inclusive sense prescribed by the first, and, when so read, the second sentence says that "agent" (including *inter alios* any person having been acting for any other person) "also includes a person serving under the Crown." It is quite evident that "serving under the Crown" is merely a descriptive appellation used in order to indicate that Crown agents are intended to be within the ambit of the first sentence. In this context the phrase "serving under the Crown" has no temporal significance. I can see nothing in the framework of the provision which would justify our attributing to the legislature the odd intention of allowing to Crown agents and their corruptors a freer field for this type of rascality than is allowed in the case of ordinary agents. The obvious intention of the added sentence is to make it clear that the first is to be applicable when the Crown is principal; and the definition of "principal" emphasizes the fact that it is intended to include the case of a person for whom the agent not only acts but has been acting.

As to the other points raised, I feel no doubt that the Australian Defence Canteens Service Central Control is "the Crown" for the purposes of secs. 3 and 4 or that *de facto* service under the Crown is sufficient to make a person obnoxious to the provisions of the Act irrespectively of whether the service was rendered under a regularly constituted contract of employment.

So far as the form of indictment is concerned, I am of opinion that it sufficiently charges an offence. It follows the language of the Act and should be treated as employing that language according to the meaning attributed to it by the Act. If there had been any possibility of the accused being prejudiced or embarrassed by not knowing exactly what case was proposed to be made under the indictment as framed, the difficulty could have been removed by particulars (*Johnson v. Miller* (1)); but there is nothing to suggest that the defence was embarrassed by the form of the indictment or that any further particulars were necessary or desired.

I am of opinion that the questions reserved should be answered as follows:—1. Yes, in the sense attributed by the statute to the words of the indictment, namely, that he was an agent who had been acting for the Crown. 2, 3, and 4. Yes. Case remitted to the trial judge.

Questions in case answered as follows:—1. No. 2. Yes.

3. He was not such an agent at the time of the payment

(1) (1937) 59 C.L.R. 467, at pp. 490, 497, 501.

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mentioned in question No. 1. 4. As to the matters referred to in questions 1 and 3: No. As to the matters referred to in question 2: Yes. Verdict of guilty set aside. Verdict of not guilty to be entered.

Solicitors for the accused, *Hedderwick, Fookes & Alston*, Melbourne, by their agents, *Sly & Russell*.

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

J. B.

[NOTE.—On 26th February 1943 the Privy Council refused leave to appeal from the decision of the High Court in this case.—Ed. C.L.R.]