[HIGH COURT OF AUSTRALIA.]

BAINBRIDGE-HAWKER . . . . APPELLANT;
DEFENDANT,

AND

THE MINISTER OF STATE FOR TRADE AND CUSTOMS FOR THE COMMONWEALTH OF AUSTRALIA . . . RESPONDENT.
PLAINTIFF,

H. C. OF A. 1957-1958.

SYDNEY, 1957, *Aug.* 30; *Sept.* 2.

Williams J.

MELBOURNE, 1958, *Mar.* 11.

Dixon C.J., McTiernan, Webb, Kitto and Taylor JJ.

Customs—Prosecutions—Institution—"In the name of the Minister"—Name—Personal or official—Period within which to institute—Expiration of period—Amendments—Customs Act 1901-1954, *ss.* 4, 245, 249.

An action which purported to be a customs prosecution within the meaning of Pt. XIV of the *Customs Act* 1901-1954 (Cth.) was brought against the defendant. On the writ of summons the plaintiff appeared in terms as "The Minister of State for Trade and Customs for the Commonwealth of Australia". The writ was endorsed with a statement which claimed declarations that the defendant had been guilty of a number of offences under the Act, the earliest of which, it charged, occurred on 8th December 1950 and the latest on 16th October 1951. The writ was issued and served on 1st December 1955 and the statement was delivered on the same day. Section 245 of the *Act* provides that customs prosecutions "may be instituted in the name of the Minister by action or other appropriate proceeding" in the High Court or a Supreme Court. Section 249 of the Act provides that customs prosecutions may be instituted at any time within five years after the cause thereof. The matter came on before *Williams* J. sitting in the original jurisdiction of the High Court on 24th September 1956 and, pursuant to r. 16 of O. 26 of the *Rules of the High Court*, his Honour ordered that two points of law raised by the defence be set down for hearing: (1) whether the action is brought "in the name of the Minister" within the meaning of s. 245 of the Act; and (2) if it is not, whether the plaintiff should be allowed to amend the writ of summons and pleadings by adding the personal name of the Minister. Upon hearing the case *Williams* J. held that s. 245 meant that the action must be brought in the personal name of the Minister so that the first question should be answered in favour of the defendant; and that the second question should be answered in favour of the plaintiff on the ground that as the plaintiff appearing on the writ was the right person even though insufficiently described the

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misnomer was a mere irregularity so that the contention that amendment would in effect revive a cause of action barred by s. 249 was incorrect.

The defendant appealed and the plaintiff cross-appealed to the Full Court of the High Court.

Held: (1) by *Dixon* C.J., *Webb* and *Taylor* JJ. that both the appeal and the cross-appeal should be dismissed.

(2) by *McTiernan* and *Kitto* JJ. that the cross-appeal should be allowed and that accordingly the question involved in the appeal did not arise.

Section 245 and the practice in Crown proceedings discussed.

Decision of *Williams* J. affirmed.

APPEAL from *Williams* J.

In a suit brought on 1st December 1955 by the Minister of State for Trade and Customs for the Commonwealth of Australia in the original jurisdiction of the High Court by writ of summons against Leslie Waldegrave Bainbridge-Hawker the plaintiff claimed: 1 (a) a declaration that the defendant had been guilty of twelve offences, particulars of which were given, against s. 233 (1) (*c*) of the *Customs Act* 1901, as amended, during the period which commenced on or about 16th March 1950 and ended 7th October 1951 respectively and that he be convicted accordingly; and (b) an order that in respect of those offences the defendant pay as a penalty sums amounting to £120,417 5s. 9d.; 2 (a) a declaration that the defendant had been guilty of eleven offences, particulars of which were given, against s. 234 (*d*) of the *Customs Act* 1901, as amended, during the period which commenced on or about 19th December 1950 and ended on 16th October 1951 respectively and that he be convicted accordingly; and (b) an order that in respect of those offences the defendant pay as penalty sums amounting to £911,667 10s. 9d.; and 3 (a) a declaration that the defendant had been guilty of eleven offences, particulars of which were given, against s. 234 (*e*) of the *Customs Act* 1901, as amended, during the period which commenced on or about 19th December 1950 and ended 16th October 1951 respectively and that he be convicted accordingly; and (b) an order that in respect of those offences the defendant do pay as penalty sums amounting to £911,667 10s. 9d.

The defendant denied certain paragraphs in the statement of claim and did not admit other paragraphs. Issue was joined.

The matter, being a customs prosecution commenced by writ of summons, came on before the High Court on 24th September 1956. At the request of the parties the Court ordered pursuant to r. 16 of O. 26 of the *High Court Rules* that the following points of

law raised by the defence delivered and filed by the defendant namely: " (1) Whether the action is brought ' in the name of the Minister ' within the meaning of s. 245 of the *Customs Act* 1901-1954 ? ; and (2) If it is not, whether the plaintiff should be allowed to amend the writ of summons and pleadings by adding the personal name of the Minister " be set down for hearing.

W. J. V. Windeyer Q.C. and *J. O'Brien*, for the plaintiff.

R. Else-Mitchell Q.C. and *D. A. Staff*, for the defendant.

Cur. adv. vult.

Nov. 1, 1956.

WILLIAMS J. delivered the following written judgment :—

In this action which is intended to be a customs prosecution within the meaning of Pt. XIV of the *Customs Act* 1901-1954 two points of law have arisen which, at the request of the parties, I ordered should be set down for hearing and disposed of under O. 26, r. 16 of the rules of this Court. They raise the question whether the action has been properly instituted because it is instituted in the name of the Minister of State for Trade and Customs for the Commonwealth of Australia whereas it is contended for the defendant that it should have been instituted in the personal name of the Minister. If that contention is disposed of in favour of the defendant, the further question arises whether an order should be made allowing the personal name of the Minister to be added to the description of his office as the plaintiff. The offences under the *Customs Acts* described in the writ and the statement of claim are mostly offences which occurred more than five years ago, and it is contended that an amendment if allowed will have the effect of reviving offences most of which are now barred by s. 249 of the *Customs Act* which provides that customs prosecutions may be instituted at any time within five years after the cause thereof. The two points of law are : (1) Whether the action is brought " in the name of the Minister " within the meaning of s. 245 of the *Customs Act* 1901-1954 and (2) If it is not, whether the plaintiff should be allowed to amend the writ of summons and pleadings by adding the personal name of the Minister.

The writ in the action was issued and served on 1st December 1955 and the statement of claim was delivered on the same day. The writ is endorsed with a concise statement of the nature of the claims made and of the relief or remedy required in the action in accordance with O. 2, r. 1 of the Rules of Court. It claims

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declarations that the defendant has been guilty of a large number of offences under certain sections of the *Customs Act* and that the defendant should be ordered to pay large sums as penalties in respect of these offences. The earliest offence charged is on 8th December 1950 and the latest on 16th October 1951. The statement of claim complies with O. 21 of the Rules of Court and alleges as required by r. 2 of that order that the matter is within the original jurisdiction of the High Court of Australia for the reason that it is a customs prosecution instituted as provided by s. 245 of the *Customs Act* as amended. In his statement of defence the defendant in answer to this allegation has pleaded that the action was not brought in the name of the Minister pursuant to the provisions of that section. Section 245 provides that " Customs prosecutions may be instituted in the name of the Minister by action information or other appropriate proceeding—(*a*) In the High Court of Australia ; or (*b*) In the Supreme Court of any State ; and when the prosecution is for a pecuniary penalty not exceeding Five hundred pounds or the excess is abandoned the Customs prosecution may be instituted in the name of the Collector in (*c*) Any County Court District Court Local Court or Court of summary jurisdiction ". Section 247 provides that every customs prosecution in the High Court of Australia may be commenced prosecuted and proceeded with in accordance with any rules of practice established by the Court for Crown suits in revenue matters or in accordance with the usual practice and procedure of the Court in civil cases or in accordance with the directions of the Court or a Judge.

The present action purports to be brought in accordance with the usual practice and procedure of the Court in civil cases. But for s. 249 of the *Customs Act*, the first point of law would be of a highly technical and artificial character because it would not be difficult to cure the defect if any in the title of the plaintiff by an amendment : *Pleasants* v. *East Dereham Local Board* (1). There was at the date of the writ on 1st December 1955 a Minister of State for Trade and Customs for the Commonwealth of Australia, namely Senator the Honourable Neil O'Sullivan, and he was the Minister of State administering " The Customs ", which is defined by s. 4 of the *Customs Act* to mean the Department of Trade and Customs, pursuant to s. 6 of that Act which provides that until it is otherwise lawfully determined the *Customs Acts* shall be administered by the Minister of State for the Commonwealth administering the Customs. Sections 17, 19A and 19B of the *Acts Interpretation Act* 1901-1950 are also material. Section 17 provides that in any Act, unless the

(1) (1882) 47 L.T. 439.

contrary intention appears, (i) " The Minister " shall mean the Minister for the time being administering the Act or enactment in which or in respect of which the expression is used. Section 19A provides, so far as material, that where in any Act it is provided that the Act shall be administered by a specified Minister of State of the Commonwealth . . . the reference to that Minister shall be read as a reference to any Minister to whom the administration of the Act is allotted by order of the Governor-General and shall be deemed to include any Minister or Member of the Executive Council for the time being acting for and on behalf of the Minister to whom the administration of the Act is so allotted. Section 19B provides that : " Where in any Act, reference is made to a specified Minister of State of the Commonwealth or a specified Department of State of the Commonwealth, and there is no longer any such Minister or Department—(*a*) the reference to the Minister shall be read as a reference to such Minister as is specified by order of the Governor-General, and shall be deemed to include any Minister or Member of the Executive Council for the time being acting for and on behalf of the Minister so specified in the order ; and (*b*) the reference to the Department shall be read as a reference to such Department as is specified by order of the Governor-General."

Section 245 of the *Customs Act*, as has been seen, authorises customs prosecutions to be instituted " in the name of the Minister " and, where the penalties sought to be recovered do not exceed five hundred pounds or the excess is abandoned, " in the name of the Collector ". Section 4 of the *Customs Act* provides that except where otherwise clearly intended " Collector " includes the comptroller and any collector of customs for the State and any principal officer of customs doing duty at the time and place and any officer doing duty in the matter in relation to which the expression is used. " Officer " means a person—(*a*) employed in the service of the customs ; or (*b*) authorised in writing by the Minister to perform the functions of an officer of customs. The word " Collector " in s. 245 of the *Customs Act* would therefore, in accordance with this definition, if it is applicable to this section, include quite a large group of persons any of whom could institute a prosecution " in the name of the Collector ". It was however held in *Christie* v. *Permewan, Wright & Co. Ltd.* (1) that the definition of collector does not apply to s. 245 and it was decided by a process of reasoning which I find it hard to follow that the word " Collector " in the section means the collector for the State or his deputy. *Griffith* C.J. said : " Now, the object of the section being to define who is to be

(1) (1904) 1 C.L.R. 693.

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the prosecutor, if it was intended that any officer may prosecute, what would have been easier than to say so ? " (1). But the definition s. (4) applies except where otherwise clearly intended and the legislature does appear to have said that customs prosecutions where a penalty not exceeding five hundred pounds is sued for may be instituted in the name of any person who is included in the definition of " Collector ". There is nothing startling in this because, as it will be seen later, s. 245 appears to have had its genesis principally in s. 11 of the *Customs and Inland Revenue Act* 1879 (Imp.) and that section provided that prosecutions for penalties under the *Customs Acts* before justices in the United Kingdom should be prosecuted by information in the name of some officer of customs or excise. In *Robertson's Civil Proceedings by and against The Crown* (1908), p. 729, there appears a form of information by an officer of customs in the following words : " Be it remembered, that A.B., an officer of Customs, under the direction of the Commissioners of Customs, informs me, (name) one of Her Majesty's Justices of the peace etc." At the time of *Christie's Case* (2), s. 8 of the *Customs Act* 1901 provided that there should in each State be a collector of customs who subject to the comptroller should be therein the Chief Officer of the Customs and should be called the Collector of Customs for the State. Since then a proviso to s. 8 and a new s. 8A have been added to the Act which make it even more difficult to believe that *Christie's Case* (2) gives effect to the true intention of the legislature. Apparently, if *Christie's Case* (2) is correct, the Comptroller-General of Customs, though he is made by s. 7, under the Minister, the permanent head of the customs and has the chief control of the customs throughout the Commonwealth, would not be entitled to institute a customs prosecution in his own name as " The Collector " within the meaning of the section, although he could direct a collector of customs for a State to do so. I must however accept the decision in *Christie's Case* (2) as a single Judge. Even then, there would still be six collectors of customs for the States, and presumably the principal officer of customs doing duty in the Northern Territory if duly authorised, in whose name customs prosecutions could be instituted and to distinguish between them it would be necessary for the personal name of the collector for the particular State to appear in the originating process. This seems to be borne out by the statement of *Griffith* C.J. (1) that the object of s. 245 is to define the person in whose name customs prosecutions are to be instituted. Even a prosecution instituted " in the name of the Minister " may be

(1) (1904) 1 C.L.R., at p. 698. (2) (1904) 1 C.L.R. 693.

instituted by the Minister whose duty it is for the time being to administer the Department of Trade and Customs or any Minister or Member of the Executive Council for the time being acting on behalf of that Minister.

Customs prosecutions for the recovery of penalties instituted under Pt. XIV of the *Customs Act* are proceedings instituted on behalf of her Majesty in right of the Commonwealth. In *Anonymous* (1) we find it said as far back as 1793 that " an information for the duties is nothing more than the king's action of debt " (2). And in books such as *Maddox's Exchequer* and *Gilbert's Exchequer* we are told how the Court of Exchequer became the court to which all cases concerning the revenue, that is cases which touched the profits of the Crown, were removed for trial. Thus in *Attorney-General* v. *Constable* (3) *Kelly* C.B. said : " The case of the *Attorney-General* v. *Barker* (4) clearly shows that it was settled law before the *Judicature Acts* that it was part of the prerogative of the Crown that the Sovereign was entitled to be an actor in any litigation affecting the rights of the Crown, and to determine in the Court of Exchequer any matter in which the Crown is interested " (5). Later, revenue cases were removed to the Exchequer Division and later still to the King's Bench Division of the High Court of Justice on its revenue side. By the *Crown Suits &c. Act* 1865, (28 & 29 Vict. Ch. 104), intituled an Act to amend the Procedure and Practice in Crown Suits in the Court of Exchequer at Westminster, provision was made for the practice and procedure of the Court of Exchequer in proceedings by English information in the Court of Exchequer and proceedings at law on the revenue side of that Court. Section 6 defined information to mean an information, styled an English information, exhibited in the Court of Exchequer in the name of Her Majesty's Attorney-General . . . as the informant. In the *Annual Practice* 1912, vol. II, Pt. X, pp. 1097 et seq. notes appear upon the procedure and practice on the revenue side of the King's Bench Division. On p. 1098 of the notes, which were supplied by an officer of the King's Remembrancer's Department, Royal Courts of Justice, a form of information is set out, the title being " Between His Majesty's Attorney-General (on behalf of His Majesty) Informant and A.B., Defendant ". Immediately under the title appear the words : " Information. To the Right Honourable (name) Lord Chief Justice of England, and to the rest of the Judges of the King's Bench Division of the High Court of Justice, Informing, showeth

(1) (1793) 1 Anst. 205 [145 E.R. 846].
(2) (1793) 1 Anst., at p. 214 [145 E.R., at p. 850].
(3) (1879) L.R. 4 Ex. D. 172.
(4) (1872) L.R. 7 Ex. 177.
(5) (1879) L.R. 4 Ex. D., at p. 173.

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unto their Lordships, Sir A.B., Knight, His Majesty's Attorney-General on behalf of his Majesty as follows." The information then proceeds to state the facts of the case). Section 247 of the *Customs Laws Consolidation Act* 1876 provides that all suits, prosecutions, or informations for recovery of penalties under the *Customs Acts* in the High Court of Justice in England may be commenced either by writ of subpoena or *capias* as the first process at the election of the Commissioners of Customs, in which shall be specified the amount of the penalty or penalties sued for. The prosecution proceeded by way of information and it was not necessary that the information should be filed before the writ of *capias* issued: *Attorney-General* v. *Reilly* (1). Order 68 of the rules of the Supreme Court in England excepts the procedure or practice in proceedings on the revenue side of the King's Bench Division of the High Court of Justice from the operation of these rules except to the extent provided for in that order. So that, as I understand it, it remained the practice in England for the Attorney-General to institute revenue proceedings on behalf of the Crown first in the Court of Exchequer, then in the Exchequer Division, and finally in the King's Bench Division on its revenue side by information until informations were abolished by the *Crown Proceedings Act* 1947. For present purposes the significant fact is that in the form of information set out on p. 1098 of the above notes the personal name of the Attorney-General appears—presumably in accordance with, as will appear, immemorial tradition and the requirement of the *Crown Suits &c. Act* 1865 that an information should be exhibited in the name of Her Majesty's Attorney-General.

Proceedings under Pt. XIV of the *Customs Act* instituted in the name of the Minister or in the name of the collector are proceedings instituted on behalf of Her Majesty. The section provides that customs prosecutions may be instituted in the name of the Minister. It does not provide that they shall be so instituted. They could still be instituted, I should think, in the name of Her Majesty for Her Majesty may participate in legal proceedings *jure coronae* either in her own person or by proper officers appearing on her behalf and this prerogative right could only be taken away by clear words. Indeed it was once the practice in this Court for customs prosecutions in the High Court to be instituted in the name of the King and of the Minister administering the customs. Two instances of this appear in reported cases. They are *R. and Minister of State for the Commonwealth administering the Customs* v. *Sutton* (2)

(1) (1843) 12 M. & W. 217 [152 E.R. 1177]. (2) (1908) 5 C.L.R. 789.

and *R. and the Minister for Customs* v. *Australasian Films Ltd.* (1). There are in the registries of the Court several other examples of unreported prosecutions instituted in the same way. No objection was taken in any of these actions to the Minister being described by his official name. But it would have been useless to have raised any such objection, since the King was a co-plaintiff. Section 245 enables prosecutions to be instituted on behalf of the Crown otherwise than in the name of the Attorney-General. It authorises them to be instituted in the name of the Minister or the collector. The section would appear to have been derived, not so much from s. 255 of the *Customs Laws Consolidation Act* 1876 (Imp.), as Mr. *Windeyer* submitted, although that section is by no means irrelevant, as from s. 218 of that Act. This section was repealed and replaced by s. 11 of the *Customs and Inland Revenue Act* 1879 (Imp.). But, for present purposes, there is no material difference between the wording of the original section and the section that replaced it.

Section 11 of the *Customs and Inland Revenue Act* 1879 (Imp.) provides that all duties, penalties, and forfeitures incurred under or imposed by the *Customs Acts*, and the liability to forfeiture of any goods seized under the authority thereof, may be sued for, prosecuted, determined, and recovered by action, information, or other appropriate proceeding in the High Court of Justice in England, or by action of debt, information, or other appropriate proceeding in the superior courts of common law at Dublin or Edinburgh, or in the Royal Courts of the Islands of Guernsey, Jersey, Alderney, Sark, or Man, in the name of the Attorney-General for England or Ireland respectively, or of the Lord Advocate of Scotland, or of some officer of customs or excise, or by information in the name of some officer of customs or excise, before one or more justice or justices in the United Kingdom, the Isle of Man, or the Channel Islands. Section 255, to which Mr. *Windeyer* referred, provides that all indictments or suits for any offences or the recovery of any penalties or forfeitures under the *Customs Acts* shall, except in the cases where summary jurisdiction is given to justices, be preferred or commenced in the name of Her Majesty's Attorney-General for England or Ireland, or of the Lord Advocate of Scotland, or of some officer of customs or inland revenue.

A precedent for the form of information in the name of the Attorney-General under the *Customs Laws Consolidation Act* 1876 is set out in *Robertson's Civil Proceedings by and against the Crown*, (1908) p. 261 ; and provides, so far as material, that Sir J. L. W.

(1) (1921) 29 C.L.R. 195.

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Knight the Attorney-General of our Sovereign Lord the King who prosecutes for His Majesty in this behalf informs the Court that etc. There is a precedent to the same effect in *Short and Mellor: The Practice of the Crown Office*, 2nd ed. (1908) p. 515. In *Halsbury's Laws of England*, 2nd ed., (1931) Crown Practice, vol. 9, at p. 670 (the 3rd ed. is subsequent to the *Crown Proceedings Act* 1947), in reference to the practice in proceedings at law on the revenue side of the King's Bench Division, it is stated that the information is in the form of a declaration. " After giving the Court to understand and be informed regarding the matters of claim, the Attorney-General prays the consideration of the Court in the premises and judgment for the amount claimed." The reader is referred to note (*s*) on the same page where he is told to see the forms in *Robertson's Civil Proceedings by and against the Crown* (1908) pp. 261-263. In all the precedents of forms of information that I have been able to find the personal name of the Attorney-General appears and this is in accordance with immemorial traditional practice as a glance at any of the precedents of forms of information in equity such as that given in *Daniell's Chancery Forms*, 2nd ed. (1871) Form 159, will show. There the general words are: " Informing, showeth unto his Lordship, Sir A. B., Knight, Her Majesty's Attorney-General (or Sir C. D., Knight, Her Majesty's Solicitor-General) on behalf of Her Majesty, as follows ". It would be difficult for a person to give the Court to understand and be informed concerning the matters of claim other than in his personal name, to which his official title was added to explain his qualification. It could not be otherwise in the case of an information because the information, after being drawn by junior counsel and settled by the Attorney-General, was engrossed and the Attorney-General's signature obtained thereto: *Short and Mellor: The Practice of the Crown Office*, 2nd ed. (1908), p. 170.

The words in s. 245 of the *Customs Act* " by action information or other appropriate proceeding " are the same words as those in s. 218 of the *Customs Laws Consolidation Act* 1876 (Imp.). It could not have been intended in either section that the word " name " should have a different meaning depending upon whether the proceedings were instituted by action or by information or by some other appropriate proceeding. If the word " name " in the case of an information refers to the personal name of the Attorney-General for England or Ireland or the Lord Advocate of Scotland, then it must also refer to the personal name of the Attorney-General or Lord Advocate where the penalty is sued for in an action or some other appropriate proceeding. In ordinary language, and that is prima facie the language of a statute, the word " name " means

the personal name of a person. In *Wharton's Law Lexicon*, 14th ed. (1938) " name " is defined as " the discriminative appellation of an individual ". Under s. 245 of the *Customs Act* the words " the Minister " could, as had been seen, refer to more than one person. They could refer to the Minister appointed to administer the customs or to the Minister or Member of the Executive Council administering the customs on his behalf. Unless the personal name of the Minister appeared on the writ, the plaintiff could be any one of the Ministers who answered this description. When one comes to the words " in the name of the Collector " the plaintiff could not, for the reasons already stated, be identified unless the personal name of the prosecutor appeared. Assuming the definition of " Collector " in s. 4 of the *Customs Act* does apply to s. 245, the proceedings could hardly be commenced, for instance, in the name of " any principal officer of Customs doing duty at the time and place ". Yet this is the only way the principal officer of customs in the Northern Territory could be officially described. Mr. *Windeyer* sought to distinguish the meaning of the word " name " in the words " in the name of the Minister " from its meaning in the words " in the name of the Collector " because of the importance of a Minister of State compared to anyone who came within the definition of collector. That distinction is of course obvious. It arises from the very nature of the two offices. It is reflected in the inclusion in s. 245 itself of two limbs, the first of which provides that the more important prosecutions may be instituted in the name of the Minister and the second of which provides that the less important prosecutions may be instituted in the name of the collector. But this consideration would not justify a different meaning being given to the word " name " in the two limbs of the section. The word must be given its ordinary natural grammatical meaning in the absence of any context to the contrary, and the context, so far from being to the contrary, supports that meaning. It is also supported by the presence of the personal name of the Attorney-General in all the precedents of informations filed by the Attorney-General on behalf of the Crown to which I have referred. It is true that many cases will be found to be reported simply under the name of the *Attorney-General* v. (*name of defendant*) but this is presumably because it is customary to report cases in which the Attorney-General is a party under this short title. If the papers were available, it would be found, I think, that the personal name of the Attorney-General or of the Lord Advocate always appeared on the information or other originating process. An example of an information by the Attorney-General in a reported case will

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be found in *Attorney-General* v. *Johnstone* (1). There the information is set out in full and the personal name of the Attorney-General appears. Examples of proceedings by the Lord Advocate in Scotland in reported cases will be found in *Lord Advocate* v. *General Commissioners of Income Tax of Cunninghame Division of Ayrshire* (2) and *Jackson's Trustees* v. *Lord Advocate* (3) and in these cases, where the petition and summons respectively are set out in full, the personal name of the Lord Advocate appears. Further examples, if required, will be found in *Attorney-General* v. *The Mayor of Plymouth* (4), and *Lord Advocate of Scotland* v. *Dunglas* (5). The words of s. 245 are "in the name" not "by the name" or "may be so described, without more" or "may be styled", expressions which occur in English Acts referred to in *Robertson's Civil Proceedings by and against the Crown* (1908) pp. 25, 31, 38, where it was intended that persons or bodies representing the Crown should sue or be sued by their official titles.

In my opinion the first point of law should be answered in favour of the defendant.

The cases where amendments of writs or pleadings have been refused because at the time of the application the cause of action has become barred by some statute of limitations would appear to fall into three broad categories. (1) Where there is a proper plaintiff but it is sought to add to the causes of action being sued upon a new cause of action which is out of time at the date of the application. In this category a leading case would appear to be *Marshall* v. *London Passenger Transport Board* (6), where Lord *Wright* M.R. said that where it was sought to amend the existing causes of action the rule was interpreted very strictly and a very strict limitation was placed upon what was meant by a cause of action or a new cause of action. (2) Where the writ has not been served within twelve months and has become ineffective and it is sought to renew the writ after the causes of action which it includes would have become barred. In this category a leading case would appear to be *Battersby* v. *Anglo-American Oil Co. Ltd.* (7), where it was said that the court will not exercise its discretion in favour of the renewal of a writ after the period allowed for service has expired . . . if the effect of doing so will be to deprive a defendant of the benefit of a limitation which has accrued. (3) Where there is a defect in the title of the plaintiff because either he is the wrong

(1) (1926) 10 Tax. Cas. 758.
(2) (1895) 3 Tax. Cas. 395.
(3) (1926) 10 Tax. Cas. 460.
(4) (1866) Wight. 134 [145 E.R. 1202].
(5) (1842) IX C. & F. 173, at p. 175 [8 E.R. 381, at p. 382].
(6) (1936) 3 All. E.R. 83, at pp. 87, 88.
(7) (1945) 1 K.B. 23.

plaintiff or he is a fictitious person there being no such person alive at the date of the writ, and it is sought to add a new plaintiff after the causes of action included in the writ have become barred. In this category a leading case would appear to be *Mabro* v. *Eagle, Star & British Dominions Insurance Co. Ltd.* (1), where *Scrutton* L.J. said: "In my experience the Court has always refused to allow a party or a cause of action to be added where, if it were allowed, the defence of the Statute of Limitations would be defeated. The Court has never treated it as just to deprive a defendant of a legal defence. If the facts show either that the particular plaintiff or the new cause of action sought to be added are barred, I am unable to understand how it is possible for the Court to disregard the statute." (2)

The present case does not fall within any of these categories. If it fell within any of them it would fall within the third category. But it is outside even this category. There was on 1st December 1955 a Minister of State for Trade and Customs for the Commonwealth of Australia. He was a living person. He was a person occupying the very office which it was necessary for him to occupy to qualify as a person having authority to institute the prosecution on behalf of Her Majesty. Thus the plaintiff in the writ was the right person. But instead of that person being identified by his personal name, the plaintiff was described by the office he held as the Minister of State for Trade and Customs. The offences set out in the writ were all offences which were still current on the date on which it was issued and served in the sense that none of them were then barred by s. 249 of the *Customs Act*. To amend the writ it will not be necessary to substitute for a plaintiff who was the wrong plaintiff because he was not authorised to institute the prosecution a plaintiff who is authorised to do so. The plaintiff will still be the same person. His description needs to be amended, that is all. Indeed, even his description in the title of the writ does not necessarily need to be amended because it would be sufficient if the commencement of the endorsement on the writ was amended so as to state that the plaintiff Senator the Honourable Neil O'Sullivan, the Minister of State for Trade and Customs for the Commonwealth of Australia on behalf of Her Majesty, claims etc. And it would be neater to commence the endorsement in this way whether the personal name of the Minister appeared in the title or not. And if this was not stated in the endorsement on the writ, the defect could be cured by the insertion of an amendment to the same effect in the statement of claim: *Hill* v. *Luton Corporation* (3);

(1) (1932) 1 K.B. 485.
(2) (1932) 1 K.B., at p. 487.
(3) (1951) 2 K.B. 387, at p. 390.

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Grounsell v. *Cuthell and Linley* (1). At the date of the writ the Minister administering the *Customs Acts* was Senator the Honourable Neil O'Sullivan, the Minister of State for Trade and Customs, but on 12th January 1956 His Excellency the Governor-General in Council, in pursuance of s. 64 of the Constitution, abolished, *inter alia*, the Department of Trade and Customs and established, *inter alia*, the Department of Customs and Excise and also made an order under s. 19B of the *Acts Interpretation Act* 1901-1950 that any reference in any Act (other than the *Tariff Board Act* 1921-1953) to the Department of Trade and Customs should be read as a reference to the Department of Customs and Excise, and since that date the Minister administering the *Customs Acts* has been the Minister of State for Customs and Excise. This Minister is the Honourable Frederick Meares Osborne. It will be necessary to amend the statement of claim so as to allege these events.

The whole extent of the attack that can be made upon the regularity of the writ is that it describes the plaintiff by his official instead of by his personal name. This is not sufficient to make the writ a nullity—it is a mere irregularity. It is at most a misnomer of the plaintiff. *Nil facit error nominis cum de corpore vel persona constat.* It is a misnomer of the same character as that discussed in such cases as *Noble Lowndes & Partners (A firm)* v. *Hadfields Ltd.* (2); *W. Hill & Son* v. *Tannerhill* (3) and *Bowler* v. *John Mowlem & Co. Ltd.* (4). In *Hill's Case* (3) the real plaintiff was W. Hill and he carried on business under the name of W. Hill & Son. It was held that to describe the plaintiff as "W. Hill & Son" instead of as W. Hill was a mere misnomer and that, as he was an actually existing person and the real plaintiff in the action, he was entitled to an order substituting for "W. Hill & Son" as the plaintiff in the action "W. Hill trading as W. Hill & Son" (the words "trading as W. Hill & Son" being treated as mere surplusage) although at the date of the application for the amendment the period of time prescribed by the *Limitation Act* 1939 (Imp.) within which the action must be brought had expired. *Scott* L.J., after referring to the passage in the judgment of *Scrutton* L.J. in *Mabro's Case* (5), which I have already cited, said: "That is a very well-known principle but it depends on the fact that the amendment turns an action which has become ineffective by reason of the passage of time into an effective action again by the addition of a new plaintiff after the date when the limitation period has

(1) (1952) 2 Q.B. 673, at p. 675.
(2) (1939) Ch. 569.
(3) (1944) K.B. 472.
(4) (1954) 3 All E.R. 556.
(5) (1932) 1 K.B. 485.

elapsed" (1). Later on in the same passage his Lordship, after referring to the mistake that had been made in the writ, said: "The question is whether that mistake is more than a mistake in form. In my opinion, it is not" (2). In *Bowler's Case* (3) *Denning* L.J. said: "A misdescription in the title is never fatal; it can be always cured by amendment in the same way as a misnomer. The thing which cannot be cured is the bringing of an action in a representative capacity when that capacity does not exist." (4). The case resembles *Christie* v. *Bell* (5) where the personal names of the plaintiffs and the defendants appeared in the record but not their official characters and the Court allowed the record to be amended by stating the characters in which the plaintiffs sued and the defendants were sued, although at the date of the application for the amendment the action against the defendants as public officers was barred by a statute of limitations. *Alderson* B. said: "It is perfectly clear, that before my brother *Parke* allowed the amendment, he must have been satisfied that the service was on these defendants, not in their private capacity, but as public officers, and was so understood by all parties. Then the only error was in the description of the parties. Where is the injury in putting in the writ the words 'public officers', when everybody understood that the defendants were sued as public officers?" (6).

A misnomer of the plaintiff under the old law gave rise to a plea in abatement but such pleas are now abolished. Rule 17 of O. 22 of the rules of this Court provides that a plea or defence shall not be pleaded in abatement. This rule is in the same terms as r. 20 of O. 21 of the Rules of the Supreme Court in England. In case of a misnomer the proper course for a defendant now to pursue is to apply to the Court or a Justice for an order that the record should be amended by the plaintiff being properly described: *Alexander Mountain & Co. (suing as a firm)* v. *Rumere Ltd.* (7). Amendments are authorised by several of the rules of this Court. There is r. 3 of O. 16 which is to the same effect as r. 2 of O. 16 of the English rules and provided that where a proceeding has been commenced in the name of the wrong person as plaintiff, if it is doubtful whether it has been commenced in the name of the right plaintiff, the Court or a Justice . . . may order another person or persons to be substituted or added as plaintiff or plaintiffs upon

(1) (1944) K.B., at p. 474.
(2) (1944) K.B., at pp. 474, 475.
(3) (1954) 3 All E.R. 556.
(4) (1954) 3 All E.R., at p. 558.
(5) (1847) 16 M. & W. 669 [153 E.R. 1358].
(6) (1847) 16 M. & W., at p. 672 [153 E.R., at p. 1359].
(7) (1948) 2 K.B. 436.

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such terms as are just. But in my opinion a misnomer of a plaintiff who is a proper plaintiff because he has the capacity to institute the proceedings would not fall within this rule although in *Etablissement Baudelot* v. *R. S. Graham & Co. Ltd.* (1) *Singleton* L.J. would appear to have thought that it could. If the case did fall within this rule, the principle that amendments should not be allowed where the effect of the amendment would be to defeat a statute of limitations might have to be applied. The present proceedings have not been commenced in the name of the wrong person as plaintiff and it is not doubtful whether they have been commenced in the name of the right plaintiff. The only doubt is whether the right person has been properly described. There is no doubt that the right person is the plaintiff. He has been misdescribed, that is all.

Rule 1 of O. 29 provides that (1) The Court or a Justice may, at any stage of the proceedings, allow a party to amend his endorsement or pleadings in such manner, and on such terms, as is just. (2) All such amendments shall be made as are necessary for the purpose of determining the real questions in controversy between the parties. Rule 6 of the same Order provides that in a case not provided for by the preceding rules of this Order, application for leave to amend may be made by a party to the Court or a Justice . . . and the amendment may be allowed upon such terms as to costs, or otherwise, as are just. Rule 12 of the same Order provides that the Court or a Justice may at any time, and upon such terms as to costs or otherwise as the Court or Justice thinks just, amend a defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding. The amendments that I have suggested can be allowed, I think, under the authority of the two last-mentioned rules. But, if they cannot, they can be directed under the third limb of s. 247 of the *Customs Act*. The alternative procedures in customs prosecutions authorised by this section are not in my opinion mutually exclusive. There are no rules of practice established by this Court for Crown suits in revenue matters. If there were such rules, Customs prosecutions might have to be conducted under them or there might still be an option to proceed under them or in accordance with the usual practice and procedure of the Court in civil cases. But, whichever procedure was adopted, the Court or a Judge would still be at liberty to act under the third limb and give directions whenever they were required to meet a situation not otherwise provided for. And, in the last resort, there is s. 79 of the *Judiciary Act* 1903-1955 (Cth.)

(1) (1953) 2 Q.B. 271, at p. 279.

which provides that the laws of each State, including the laws relating to procedure . . . shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State in all cases to which they are applicable. Doubts have been expressed whether this section applies to the High Court but I fail to see why it should not, an opinion supported by *Dixon* J. (as the Chief Justice then was) in *Cohen* v. *Cohen* (1). This section would co-opt s. 75 of the *Common Law Procedure Act* 1899 (N.S.W.) as amended, and this section provides that no plea in abatement for a misnomer shall be allowed in any action ; but the defendant may cause the declaration to be amended at the cost of the plaintiff upon a judge's summons founded on an affidavit of the right name.

The title of the writ and pleadings should be amended, I think, by designating as the plaintiff Senator the Honourable Neil O'Sullivan, the Minister of State for Trade and Customs for the Commonwealth of Australia, the title of the pleadings should then be re-amended by substituting as the plaintiff the Honourable Frederick Meares Osborne, the Minister of State for Customs and Excise for the Commonwealth of Australia, and the endorsement on the writ amended and the statement of claim amended and re-amended in the way I have suggested.

The order that I think should be made on the argument of the points of law is that the plaintiff be at liberty to make these amendments and re-amendments, that the costs of the argument of the points of law be the defendant's costs in the cause, and that the plaintiff should pay the costs of and occasioned by the amendments and re-amendments if made. The amendments and re-amendments to be made within twenty-one days from the date of this order.

Finally I think that I should add that I have read in the newspapers that since I reserved my decision the Honourable F. M. Osborne has ceased to be the Minister of State for Customs and Excise so that a further re-amendment of the pleadings may be required. But this information is not judicially before me and a further application to the Court or a Justice for a consent order or otherwise may be necessary.

The points of law raised as above were answered : (1) No ; (2) Yes, and the Court ordered that the plaintiff be at liberty to amend the name of the plaintiff in the title of the writ and the pleadings by inserting before the words " The Minister of State for Trade and Customs for the Commonwealth of Australia " the

(1) (1929) 42 C.L.R. 91, at p. 99.

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words " Senator the Honourable Neil O'Sullivan " and to re-amend the title of the pleadings by inserting as the plaintiff from 12th January 1956 the name " The Honourable Frederick Meares Osborne the Minister of State for Customs and Excise for the Commonwealth of Australia " and by amending the endorsement on the writ by omitting therefrom the words " The plaintiff's claim is for " and inserting in their stead the words " Senator the Honourable Neil O'Sullivan the Minister of State for Trade and Customs for the Commonwealth of Australia on behalf of Her Majesty claims " and by inserting in the statement of claim an allegation to the same effect and to re-amend the pleadings by inserting in the title the name " The Honourable Frederick Meares Osborne the Minister of State for Customs and Excise for the Commonwealth of Australia " and by inserting in the statement of claim an allegation that on 12th January 1956 His Excellency the Governor-General in Council in pursuance of s. 64 of the Constitution abolished, *inter alia*, the Department of Trade and Customs and established, *inter alia*, the Department of Customs and Excise and also made an order under s. 19B of the *Acts Interpretation Act* 1901-1950 that any reference in any Act other than the *Tariff Board Act* 1921-1953 to the Department of Trade and Customs should be read as a reference to the Department of Customs and Excise and that since that date the *Customs Acts* have been administered by the Honourable Frederick Meares Osborne the Minister of State for Customs and Excise for the Commonwealth of Australia.

From that decision the defendant appealed and the plaintiff cross-appealed to the Full Court of the High Court.

W. J. V. Windeyer Q.C. (with him *J. O'Brien*), for the respondent. The suit was properly instituted. An amendment was not necessary. If the suit was defective an amendment was properly made as the defect was one which formerly would have been pleaded in abatement and not in bar (*Mayor and Burgesses of Stafford* v. *Bolton* (1)). If an amendment were needed, the correct amendment would be to insert the personal name of the Minister at the time the suit was instituted ; and, if necessary, make an order under O. 18 r. 2 of the *High Court Rules*. The real party in a customs prosecution is the Crown as the proceedings are brought to recover a debt due to the Crown or to enforce a forfeiture to the Crown. The statement by the judge below on this aspect and the cases cited by him are relied on by the respondent : see *Barry* v. *Arnaud* (2). The Minister

(1) (1797) 1 Bos. & Pul. 40, at p. 44 [126 E.R. 767, at p. 769].

(2) (1839) 10 Ad. & E. 646 [113 E.R. 245].

is simply the authorised attorney for the Sovereign. In a customs prosecution he performs the duties which the Attorney-General historically and normally performs. It is not necessary that the Attorney-General should be the Sovereign's attorney; any duly authorised person may be: *R.* v. *Wilkes* (1); *Solicitor-General* v. *Wylde* (2); on appeal (3). If there be any misdescription or insufficient description it is not of the party which is the Crown but of the Crown's attorney. Section 245 of the *Customs Act* 1901-1954 is permissive. It enables customs prosecutions to be brought in the name of the Minister instead of in the name of the Sovereign or by information of the Attorney-General. The history of the section is sufficiently set forth by the judge of first instance. The only question is whether the words "the Minister of State for Trade and Customs" sufficiently describe the occupant of that office. The respondent does not dispute that it has been the usual practice to describe the Attorney-General by his personal name as well as by his office, especially in informations: see the authorities referred to by the judge of first instance and also *Cole* on *Criminal Informations* (1843), p. 262; *Grady and Scotland's Practice of the Crown Side of the Queen's Bench* (1844), pp. 348, 384; and *Wentworth* on *Pleading*, (1797), vol. IV—*Indictments and Informations*. The relevant practice in New South Wales is that of the High Court—*Customs Act* 1901-1954, *High Court Procedure Act* 1903-1950, ss. 23, 24. As to the effect of misnomers and pleas in abatement: see *Bacon's Abridgment*, title *Misnomer and Addition*; *Comyns Digest*, 5th ed., vol. 1, p. 63, "*Abatement*"; *Bracton*, folio 189, 3rd vol.—*Crown Series*, p. 217; and *Chitty's Archbold*, 11th ed. (1862), vol. 1, p. 185. In more modern times the rule seems to be that the defendant cannot take advantage of a misnomer of the plaintiff if he knows who the plaintiff really is and if he knows who is the person who is seeking a remedy against him. When a Crown official sues on behalf of the Crown, even though he sue in his personal name, the proceedings do not lapse if he goes out of office; revivor and amendments are unnecessary: *Daniell's Chancery Forms*, Form 157, and *Attorney-General* v. *Josephson* (4). The term "the Minister" at any given time means only one person, who is identifiable, identifiable because he holds a constitutional office: *The Constitution*, (63 & 64 Vict. c. 12), s. 64; *Acts Interpretation Act* 1904-1950 (Cth.), ss. 19A, 19B. The office is a constitutional office created by s. 64 of the Constitution.

(1) (1770) 4 Burr. 2527, at p. 2553 [98 E.R. 327, at p. 341].
(2) (1945) 46 S.R. (N.S.W.) 83, at pp. 90, 93, 104; 62 W.N. 246.
(3) (1948) 78 C.L.R. 224.
(4) (1865) 4 S.C.R. (N.S.W.) 135, at pp. 138, 139.

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As to informations by the Queen's Attorney or Solicitor-General see *Daniell's Chancery Practice*, 7th ed. (1901), vol. 1, pp. 48-61. Unless restricted by some rule of law or practice a party's name for the purpose of proceedings is any appellation customarily used to designate him. Certainty of identification is what is required. That was the reason for the old strict law about the use of correct names and the reason for the now repealed Statute of Additions (*Hawkin's Pleas of the Crown*, 8th ed. (1824) vol. 2, p. 260). A description of the occupant of a constitutional office by his official name has in Australia been often accepted as a sufficient naming of him when he sues or is sued in his official capacity. Judgments have been given in suits so constituted. No objection was taken, yet if s. 245 compels a personal name to be used such suits were never properly instituted. The appellant ought not to be allowed to raise this contention. He delayed putting on a defence. This contention is in the nature of a plea in abatement and should have been promptly taken: *Alexander Mountain & Co.* v. *Rumere* (1); *High Court Procedure Act* 1903-1950, ss. 23-25. The next aspect of the matter is: if no objection were taken and the proceedings reached a conclusion, would the judgment be good? According to the appellant it would not. The section is complied with by the use either of the personal name and proving that he is the Minister, or by the use of any appellation: see *Wharton's Law Dictionary*; *Bullen and Leake* on *Names of the Parties in Pleadings*; *Chitty's Archbold*; *Common Law Procedure Act* 1852, s. 4, and *Wells* v. *Baron Suffield* (2). An interesting collection of names and titles used is to be found in *Butterworth's Encyclopaedia of Forms and Precedents* under *Parties*. [He referred to *The Commonwealth* v. *Melbourne Harbour Trust Commissioners* (3).] It is desired to get back to the practice of having a static name, whether it be personal or the name of an office. The procedure should be settled.

[DIXON C.J. referred to *Bennet, Bailiff of Westminster* v. *Filkins* (4).]

Section 79 of the *Judiciary Act* 1903-1955 brings into operation some of the laws of the States, and so far as New South Wales is concerned, the procedure is in substance what it was in England between 1833 and the enactment of the rules of the Supreme Court. As to s. 247 of the *Customs Act* 1901-1954 this action was commenced in accordance with the usual practice and procedure of the Court in civil cases.

(1) (1948) 2 K.B. 436, at pp. 437, 439, 440.
(2) (1847) 4 C.B. 750 [136 E.R. 703].
(3) (1922) 31 C.L.R. 1, at p. 17.
(4) (1666) 1 Wms. Saund. 14 [85 E.R. 16].

Sir *Garfield Barwick* Q.C. (with him *R. Else-Mitchell* Q.C. and *D. A. Staff*), for the appellant. This objection is not at all equivalent to a form of plea in abatement, nor is the learning on pleas in abatement or misnomer at all relevant. If, as the judge of first instance found, the statute required the proper name of the person who was the Minister administering this Act at the time to be the name of the plaintiff in the cause, then there was no room for amendment, for, in truth, there never was a plaintiff. Rules of practice, orders and directions cannot enable alteration of the statute. Part XIV provides the exclusive method of recovering these penalties. The name there should be construed as meaning the personal name. If it be said " There is no certain person called the Minister, ' the Minister ' means the person administering the Act at the moment " ; then substitute that collocation of words for " the Minister ", the point emerges quickly—" the Customs prosecution may be instituted in the name of the person who is administering, as a Minister of the Crown, the Act at that time ". It is not enough to be the Minister for Trade and Customs, because he may not be administering the Act. An issue at a trial in one of these prosecutions could be the issue : " were you the Minister administering at the time ? ". If not, then the action would fail. Sections 4, 244 and 264 taken together show the evident intention that all customs prosecutions shall be carried out in one or other of the manners provided by Pt. XIV. The time limitation indicates that there are to be no customs prosecutions outside the methods provided in the Part, because ss. 244 and 245 are tied to the idea of a customs prosecution. [He referred to *Christie* v. *Permewan Wright & Co. Ltd.* (1).] The customs prosecutions may only be instituted conformably with the Part, then whilst the word " may " in the phrase " may be instituted " in s. 245, is permissive, it is permissive merely because there is an alternative afforded because they may be instituted in one place or the other, but behind them there is a negative that they shall not be instituted in the other manner. The name of the present holder of the position is not in any sense the Minister, that is his office, and the title of his office. A Minister is not a name at all, nor is he a person. Reference to " the Minister " is not a reference to a legal person in the sense that he is either an actual person or a corporate person. A person, however, may be a Minister. [He referred to *Williams* v. *Silver Peak Mines Ltd.* (2).] There is no allegation that the one who is said to be the plaintiff was administering the Act at the time. The name must be there, that is to say the action should be commenced in the name of Senator

(1) (1904) 1 C.L.R. 693.

(2) (1915) 21 C.L.R. 40, at pp. 52, 53.

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O'Sullivan if he was in fact administering the Act at the time. In relation to the averment provision in s. 255 the power to aver is given to the prosecutor or plaintiff. Whilst it is true that the Court by the *Evidence Act* takes judicial notice of the Ministers of State, the Court would not take judicial notice of the particular fact as to which Minister of State was administering a particular Act at any given moment: see *Holland* v. *Jones* (1). An examination of the past with respect to earlier proceedings points to the fact that where the Attorney-General sued, or the Minister sued, he sued by his name, and also that the name of his office was not his name. The appellant adopts the judgment of the judge of first instance. A local practice cannot alter the statute. The whole point of *The Commonwealth* v. *Melbourne Harbour Trust Commissioners* (2) was that it was a deed and that it was the grantor's description that was being dealt with.

[KITTO J. referred to *Chitty's Archbold*, p. 187.]

The action must commence by complying with the requirements of the statute as to the title. The question of amendment is not reached until one has accepted the view that " in the name of the Minister " means in the personal name of the person who is administering the Act at the date in question. If one makes the point that the action must proceed in the name of the Minister for the time being administering there could be no question of amendment. This is not a question of misnomer; misnomer is where there is the plaintiff in the action, but he is wrongly described; his name is wrong. [He referred to *Noble Lowndes and Partners (A Firm)* v. *Hadfields Ltd.* (3); *Hill* v. *Luton Corporation* (4); *W. Hill & Son* v. *Tannerhill* (5); *Mabro* v. *Eagle, Star & British Dominion Insurance Co. Ltd.* (6); *Bowler* v. *John Mowlem & Co. Ltd.* (7); *Alexander Mountain & Co.* v. *Rumere* (8); *Tetlow* v. *Orela Ltd.* (9); *Clay* v. *Oxford* (10); *R.* v. *Commissioner of Patents*; *Ex parte Weiss* (11) and *Etablissement Baudelot* v. *R. S. Graham & Co. Ltd.* (12).]

[TAYLOR J. referred to *Belgian Economic Mission* v. *A. P. & E. Singer Ltd.* (13).]

The " firm " cases could not very well be regarded as cases of non-existent firms, because in all those cases the firm name had been the name in which the relationship of the parties had taken place.

(1) (1917) 23 C.L.R. 149, at pp. 152, 153.
(2) (1922) 31 C.L.R., at p. 17.
(3) (1939) Ch. 569, at pp. 570, 571.
(4) (1951) 2 K.B. 387, at pp. 391, 392.
(5) (1944) K.B. 472, at p. 473.
(6) (1932) 1 K.B. 485.
(7) (1954) 3 All E.R. 556, at p. 558.
(8) (1948) 2 K.B., at pp. 437, 439.
(9) (1920) 2 Ch. 24.
(10) (1866) L.R. 2 Ex. 54.
(11) (1939) 61 C.L.R. 240, at pp. 252, 259.
(12) (1953) 2 Q.B. 271.
(13) (1950) W.N. (Eng.) 418.

It was an actual name. The Minister is the person who is the Minister of State administering the Act. In this case to allow a change of name only would not really cure what is wrong with the claim because there is no assertion that any particular person was administering this Act at the relevant time. That would mean that the cause of action would not be disclosed. Merely to change the name is not enough. When the statute speaks of the name of the Minister, it is really requiring the personal name of the person who is administering the Act being a Minister of State.

[KITTO J. referred to *Seale-Hayne* v. *Jodrell* (1) and *Bombay Burma Trading Corporation Ltd.* v. *Aga Mahomet Khaleel Shirazee* (2).]

The title Minister of the Interior is not in any sense part of a man's name. [He referred to *Christie* v. *Permewan Wright & Co. Ltd.* (3).] There is some purpose in saying " in the name of " and it will not do to say that any unauthorised person could bring the prosecution. In relation to s. 245 a prosecution which may be commenced in the name of the collector in one of the inferior courts could also be the same prosecution that could have been commenced in the name of the Minister in one of the superior courts. It would be odd if one would give a different significance to the word " name " and one finds some different policy with respect to the word " name " in the one case rather than the other. Here, the words are not ambiguous.

W. J. V. Windeyer Q.C., in reply.

Cur. adv. vult.

Mar. 11, 1958.

The following written judgments were delivered :—

DIXON C.J. This action has been brought in purported pursuance of Pt. XIV of the *Customs Act* 1901-1954 for the recovery of penalties incurred by the defendant, as it is alleged under ss. 233 (1) (*c*) and 234 (*d*) and (*e*) of that Act.

The offences are laid as having taken place on specified dates between early in December 1950 and the middle of October 1951. Section 249 of the *Customs Act* provides that Customs prosecutions may be instituted at any time within five years after the cause thereof. The writ of summons was in fact issued on 1st December 1955, that is to say within the period of limitation. It was issued in this Court by the Commonwealth Crown Solicitor and, in accordance with what appears to have long been the practice in such cases of that officer, the plaintiff was simply designated by the name of

(1) (1891) A.C. 304.
(2) (1911) L.R. 38 Ind. App. 169.
(3) (1904) 1 C.L.R., at pp. 696-699, 701.

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his office viz. the Minister of State for Trade and Customs for the Commonwealth of Australia. Section 244, with which Pt. XIV of the *Customs Act* commences, provides that proceedings for the recovery of penalties under that Act and certain other proceedings are to be therein referred to as customs prosecutions. Section 245, although it was enacted two years before the passing of the *Judiciary Act* 1903 by which the notional existence of this Court under the Constitution was converted into an actual existence, provided that customs prosecutions may be instituted in the High Court of Australia or in the Supreme Court of any State. If the prosecution is for a penalty not exceeding £500, or the excess is abandoned, it may be instituted in a county district or local court or a court of summary jurisdiction. It is to be noticed that the section is expressed in enabling or permissive language. But the provision is not concerned alone with the courts in which customs prosecutions may be brought: it is concerned also with the form of proceedings. This is dealt with in the opening words of s. 245: "Customs prosecutions may be instituted in the name of the Minister by action or other appropriate proceeding" in the High Court or a Supreme Court. In a similar way when the section goes on to give jurisdiction to the inferior courts where the penalty does not exceed £500 or the excess is abandoned, it provides "the customs prosecution may be instituted in the name of the Collector". By definition "the Minister" means the Minister for the time being administering the Act: s. 17 (*i*) of the *Acts Interpretation Act* 1901. The *Customs Act* itself defines "Collector": s. 4. The word includes the Comptroller and any Collector of Customs for the State and any principal officer of customs doing duty at the time and place and any officer doing duty in the matter in relation to which the expression is used.

The defendant objects that the action is improperly brought and is incompetent because the plaintiff is designated by the title of his office and is not identified by his personal name. For this reason, according to the defendant, the cause is not a customs prosecution instituted in the name of the Minister by action. *Williams* J. considered that because the Minister's personal name had not been given there had been a failure to comply with the requirements of s. 245, but that it was a matter for amendment. His Honour amended the proceedings accordingly. Assuming that s. 245 does require the use of the personal name of the Minister with or without the designation of his office, I can entertain no doubt that his Honour was entirely right in regarding the matter as one for amendment. Indeed I should doubt whether even on that

footing an amendment was necessary. For the defendant appeared to the writ, allowed much time to pass, received a statement of claim and sought particulars. He then delivered a defence. He raised his point for the first time then and by the inappropriate course of taking an objection in point of law in that pleading. The last paragraph of the statement of claim, par. 83, alleged that the matter is within the original jurisdiction of the High Court for the reason that it is a customs prosecution instituted as provided for by s. 245 of the *Customs Act* 1901. It may perhaps be remarked that a sufficient ground of jurisdiction is that the matter is one in which a person suing on behalf of the Commonwealth is a party. However, by par. 4 of his defence the defendant denied par. 83 of the statement of claim and said that the action was not brought in the name of the Minister pursuant to the provisions of s. 245 of the *Customs Act* 1901-1954. It would seem to me that by that time the defendant had waived any objection to the manner in which the plaintiff was named, identified or designated, and that in any case the objection required an independent application and not an objection in point of law to the maintainability of the action. The pleader of course sought to elevate the objection into one as to the maintainability of the action. For the use which the defendant desired to make of it was to defeat the present action and, should a new action be instituted, to plead that more than five years has elapsed since the cause thereof arose so that the action would be barred by s. 249 of the *Customs Act*. The objection having been thus taken recourse was had to r. 16 of O. 26 which says that a party is entitled to raise by his pleading any point of law and that a point so raised shall . . . (*b*) by consent of the parties or by order of the Court or Justice on the application of either party be set down for hearing and disposal at any time before the trial. The order of *Williams* J. recites that at the request of the parties the Court had ordered that the following points of law raised by the defence delivered and filed by the defendant be set down for hearing namely (1) whether the action is brought " in the name of the Minister " within the meaning of s. 245 of the *Customs Act* 1901-1954 and (2) if it is not, whether the plaintiff should be allowed to amend the writ of summons and pleadings by adding the personal name of the Minister. It will be noticed that the second of these questions goes beyond the objection in the pleading and deals with a question arising on the hypothesis that the objection is upheld. Further it may be said that by its very form this question assumes the power to amend and inquires whether it should be exercised, which is hardly a matter of law.

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But what is more important the first of these two questions treats the matter as one of expressed legislative intention; do the words "in the name of the Minister" as a matter of actual meaning necessitate the use of the personal name? I think that to ascribe to the provision an actual intention to prescribe the manner in which the Minister shall be designated is rather to misconceive the purpose of s. 245. Its purpose in using the words "may be instituted in the name of the Minister by action information or other appropriate proceeding" was to make it unnecessary to sue in the name of the Crown and at the same time to appoint the Minister administering the customs rather than the Attorney-General as the Minister in whose name the Crown proceeding should be instituted. I do not think that in the words "in the name of the Minister" is to be found any actual intention to require the personal name in preference to or in combination with the official name. The point of the material words of the provision is the designation by the section of the responsible officer of the Crown who is to sue on behalf of the Crown, not the prescribing of the manner in which he must be named or described in the writ or information.

This view of s. 245 means that the question whether the personal name of the Minister should be used depends rather on the established or appropriate procedural way of carrying out a requirement that a Crown suit or prosecution shall be instituted in the name of a Minister, than upon discovering in the very words of the provision an actual intention that the personal name or the official name shall be used, one to the exclusion of the other, or that the personal name shall be used with the official description added. When however you turn to the history of the law concerning Crown proceedings in the name of a Minister you find much to suggest that the proper course is to employ the Minister's personal name followed by the description of his office so as to show the character in which he proceeds. It was so with the Attorney-General in *ex officio* criminal informations; and also with the Queen's Coroner and Attorney or Master of the Crown Office: see for example *Crown Circuit Companion* (1820), p. 150 and p. 259; *Chitty's Criminal Law* (1816), vol. I, pp. 846, 849, vol. II, pp. 6, 7: *Cole, Criminal Informations*, (1843), pp. 262, 269. It was so too with informations of *quo warranto*: see *Cole op. cit.* pp. 320, 328. Informations and bills in Chancery in suits on behalf of the Crown or *ex relatione* commenced with the Attorney-General's personal name and the description of his office: see *J. S. Smith, Practice of the Court of Chancery*, 7th ed. (1862), vol. 2, pp. 247, 248. In all the forms but one of information on the civil side given in *Robertson's Civil Proceedings by and against*

the Crown (1908) the use of the personal name of the Attorney-General appears and that of course includes revenue proceedings (see *op. cit.* pp. 261, 264, 265, 267). The exception is an information of intrusion following a writ of subpoena (p. 269).

But although the settled practice in England has been to give the Attorney-General's personal name, the consequence of a failure to do so can never have been the total invalidity of the proceeding. In a case of 1673 in debt by the King the pleading seems to have taken the form of that of a subject—*Rex per attornatum queritur et unde producit sectam.* One report shows that *Saunders* urged that the declaration should be in the name of the Attorney-General *et unde A.G. pro domino Rege dicit etc.* This does not necessarily refer to the personal name but the pleading certainly deserted the form used for the Crown. But *Hale* L.C.J. described it as but an unmannerly way of declaring for the King and the declaration was in the end declared good: *R.* v. *Gregory* (1). See further *R.* v. *Wilkes* (2). Section 245 of the *Customs Act* 1901 may perhaps be traced back through s. 11 of 42 & 43 Vict. c. 21 and s. 218 of 39 & 40 Vict. c. 36 and ss. 263 and 301 of 16 & 17 Vict. c. 107 to s. 13 of 26 Geo. III c. 77. The last-named section prohibited actions for the recovery of penalties or forfeitures by virtue of any Act relating to the customs or excise unless the same were prosecuted in the name of the Attorney-General or some officer of the said revenues. One can be certain that in proceedings in conformity with all these provisions the practice would be to use the personal name of the Attorney-General or the Officer of the Revenue. But that is, to my mind, not the result of the necessary meaning of the statute but of the established forms of Crown procedure at law and in equity. I think that the more correct practice in Crown proceedings in right of the Commonwealth is to use the personal name as well as the description of the office not only in the case of the Attorney-General but also in that of the Minister administering the *Customs Act.*

But the failure to do so cannot be fatal to the proceedings. Indeed I think that on no view of s. 245 could the argument be maintained that the writ of summons was ineffectual. Even if, contrary to my view, it were an intended requirement of s. 245 itself that the Minister's personal name should be used, it does not follow that a failure to comply would leave the proceeding void. The Minister was in fact identified adequately by the designation of his office; there was no doubt as to the nature and character of the

(1) (1673) 2 Lev. 82 [83 E.R. 460]; 3 Keb. 127 [84 E.R. 633, 654].

(2) (1770) 4 Burr. 2527, at p. 2553 [98 E.R. 327, at p. 341].

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action nor the parties. It was on that footing essentially a case for amendment and the fact that a new writ would be out of time afforded no sufficient reason why the amendment should not be allowed: cf. *Noble Lowndes and Partners (A Firm)* v. *Hadfields Ltd.* (1); *W. Hill & Son* v. *Tannerhill* (2); *Alexander Mountain & Co.* v. *Rumere Ltd.* (3); *Etablissement Baudelot* v. *R. S. Graham & Co. Ltd.* (4); *Hill* v. *Luton Corporation* (5). As to *Hilton* v. *Sutton Steam Laundry* (6) which in any case is a difficult decision, it is enough now to refer to the distinction so clearly taken by *Donovan* J. in *Stebbings* v. *Holst & Co. Ltd.* (7).

The only question which remains concerns the order which should be made to give effect to the views I have expressed. To amend the description of the plaintiff as *Williams* J. did may not have been a necessary course, but it certainly was not erroneous. The defendant's appeal from the order for amendment must therefore be dismissed. But to answer the first question with an unqualified negative is hardly consistent with the view I have expressed (viz. that s. 245 does not by its very intention require the use of the personal name of the Minister). What I would do is to substitute for the answers to the two questions a declaration that the failure to use the personal name of the Minister is no more than an irregularity and that an amendment is proper. Otherwise I would dismiss the cross-appeal.

I think that the defendant-appellant should pay the costs of the appeal and cross-appeal.

McTIERNAN J. The prior question for decision is raised by the cross-appeal. The question is whether this action was instituted in accordance with s. 245 of the *Customs Act* 1901-1954. The action was instituted by the respondent for the recovery from the appellant of penalties under the Act. Cases of this kind are spoken of in s. 244 as " proceedings by the Customs ". A proceeding for the condemnation of property is included in the same description. All such proceedings are by s. 245 referred to as " Customs prosecutions ". These are essentially proceedings on behalf of the Crown. Section 245 prescribes a manner of instituting any Customs prosecution. The material words of the section are: " Customs prosecutions may be instituted in the name of the Minister ". If no more

(1) (1939) Ch. 569, at p. 572.
(2) (1944) K.B. 472, at p. 474.
(3) (1948) 2 K.B. 436.
(4) (1953) 2 Q.B. 271.
(5) (1951) 2 Q.B. 387.
(6) (1946) K.B. 65; (1945) 2 All E.R. 425.
(7) (1953) W.L.R. 603, at pp. 605-606; 1 All E.R. 925, at p. 927.

than £500 is claimed a similar provision of s. 245 enables the prosecution to be instituted " in the name of the Collector ". The name of the plaintiff in the present action is apt to describe the Minister who was administering the *Customs Acts* when the action was entered. With the Minister suing in his official name, the action appears more like " proceedings by the Customs " than if he sued only in his proper name. The point at issue in the cross-appeal is whether it is necessary to supply the Minister's proper name before his official title in the writ of summons in order properly to comply with s. 245. The words of the section "in the name of" are defined as a whole in the dictionaries. The English *Oxford Dictionary*, vol. 7, at p. 14, says that a meaning of the phrase is " implying that action is done on account or on behalf of some other person or persons. Hence by contrast to this, in one's own name ". See also *Webster's International Dictionary*, p. 1,434. But in the case of *Christie* v. *Permewan Wright & Co. Ltd.* (1) the effect of the words " in the name of the Collector " is explained. It would appear that the customs prosecutions which may be instituted by the collector must be instituted by his direct agency, not by another person in his behalf. This decision is applicable to the construction of the Minister's authority under the section, because the words creating it are similar. But it is not settled whether " in the name of the Minister " means in his official or proper name. In its ordinary meaning the name of a person may be his proper name or denote an office which he holds. It would not be a satisfactory construction of s. 245 to say that it is enough to institute a customs prosecution if the Minister's proper name only is used to identify the person who is plaintiff. The more appropriate interpretation of the word " name " in the present context is one denoting the title or office of the person who is the party instituting the customs prosecution. This does not mean of course that it would be a departure from the manner which the section prescribes for instituting such a proceeding if both the official and proper name of the Minister are used to identify the person who is the plaintiff. I am of opinion that the manner in which the present action is instituted satisfies the terms of s. 245 creating the authority of the Minister to institute a customs prosecution. In this view the point involved in the appeal does not arise. I would dismiss the appeal and allow the cross-appeal.

WEBB J. The questions that arise in this appeal are (1) whether a prosecution for the recovery of penalties under s. 245 in Pt. XIV of the *Customs Act* 1901-1954 is properly brought in the name of the

(1) (1904) 1 C.L.R., at p. 698.

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office of the Minister of State for Trade and Customs for the Commonwealth of Australia, or whether it should be brought in the personal name of the Minister; and if it should be brought in his personal name, then (2) whether the writ and pleadings can be amended by adding the personal name; and if so, then (3) whether the amendment can be made after five years from the institution of the prosecution.

As to the first question, s. 245 provides *inter alia* that customs prosecutions may be instituted in the name of the Minister, and when the prosecution is for a pecuniary penalty not exceeding £500 it may be instituted in the name of the collector. The Collector is defined in s. 4 of the Act to include the Comptroller and any Collector of Customs for the State and any principal officer of customs doing duty at the time and place and any officer doing duty in the matter in relation to which the expression is used. By s. 17 (*h*) and (*i*) of the *Acts Interpretation Act* 1901-1950 "Minister" is defined as meaning one of the Queen's Ministers of State for the Commonwealth, and "The Minister" is defined as meaning the Minister for the time being administering the Act in or in respect of which the expression is used. By s. 250 (A), which was inserted in 1910 by s. 13 of Act No. 36, it is expressly provided that where in any proceedings on behalf of the customs it is necessary to allege any property in the goods they may be alleged to be the property of the Collector *without mentioning his name*. The definition of "Collector" in s. 4 does not apply to s. 245: *Christie* v. *Permewan Wright & Co. Ltd.* (1).

With considerable hesitation I conclude from these provisions that s. 245 requires the prosecution to be instituted in the personal name of the Minister, although to identify the individual prosecutor it would still be necessary to add the name of his office.

Most of the argument was directed to the first question and many English cases and authorities were referred to. It was desirable to review these to see whether they threw any light on the problem, but I fail to see that they are of any assistance. The problem as I appreciate it still remains one of construction of the *Customs Act* from its terms alone.

As to the second question, the power to amend, the prosecution was instituted by the proper official, although not in his personal name. The identity of the prosecutor was revealed but without disclosing what particular individual he happened to be. This disclosure if made could not have advanced the interests of justice

(1) (1904) 1 C.L.R., at p. 699.

in the slightest degree. How such a defect or error could be anything but formal I am unable to see. At most it was a misnomer. But even if it were substantial it is not necessarily beyond the power to amend. The failure to disclose the personal name constituted I think a defect or error in the proceedings that could have been amended under s. 251 of the *Customs Act*, which precludes objections to informations for any alleged defect therein in substance or in form and enables the Court to make the necessary amendments to determine the real question in dispute ; or it could have been amended under s. 23 of the *High Court Procedure Act* 1903-1950 ; or it might quite properly have been regarded as nothing more than a formal defect or irregularity causing no substantial injustice and not invalidating the proceedings, as s. 24 enacts. It is submitted however, for the appellant that there was no proceeding, no information, to amend because the personal name was not used. But I am unable to see how this could be the case where the prosecution was instituted by the proper official, although not in the prescribed way, and no injustice resulted in any event. No doubt s. 245 is a statutory requirement, but it can be modified by other statutory provisions, and in my opinion it is modified by s. 251 of the *Customs Act* and by ss. 23 and 24 of the *High Court Procedure Act*. Indeed s. 245 requires just that type of embellishment, if I may call it such, against the failure to observe which one would expect that the three last-mentioned sections were designed to relieve. These are civil proceedings : *Naismith* v. *McGovern* (1).

As to the third question, s. 249 requires customs prosecutions to be instituted within five years ; but this does not preclude an amendment under s. 251 of the *Customs Act* or s. 23 of the *High Court Procedure Act* or the operation of s. 24 of the latter Act after the expiration of five years. It is the due institution of the prosecution that is subject to the time limitation and not the amendment of the information ; and its due institution is not prevented by such a defect or error as is specified in the above sections allowing amendment ; nor is it postponed pending amendment.

I would dismiss the appeal and the cross-appeal.

KITTO J. On 1st December 1955 a writ of summons was issued out of this Court commanding the present appellant, as defendant, to enter an appearance in an action " at the suit of the Minister of State for Trade and Customs for the Commonwealth of Australia ". The writ was issued at the instance of the Crown Solicitor for the Commonwealth, and it was endorsed with claims for declarations that the defendant had been guilty of a large number of offences

(1) (1953) 90 C.L.R. 336.

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against provisions of the *Customs Act* 1901 (Cth.), as amended, and for orders that the defendant pay specified penalties in respect of the breaches.

A statement of claim was filed, and it alleged that the matter was within the jurisdiction of the Court for the reason that it was a customs prosecution instituted as provided for by s. 245 of the *Customs Act*. The defendant put this in issue by his defence, adding that the action was not brought in the name of the Minister pursuant to the provisions of s. 245 of the *Customs Act*. At the request of the parties an order was made under O. 26, r. 16 that two points of law be set down for hearing, namely (1) Whether the action is brought "in the name of the Minister" within the meaning of s. 245 of the *Customs Act* 1901-1954; and (2) If it is not, whether the plaintiff should be allowed to amend the writ of summons and pleadings by adding the personal name of the Minister. Upon these questions being argued before *Williams* J. his Honour answered them (1) No and (2) Yes, and gave the plaintiff liberty to amend the writ and pleadings accordingly. The defendant appeals against the second answer and the granting of leave to amend, and the plaintiff cross-appeals against the first answer.

The questions are of general importance, but their special significance in this case is due to the fact that it is now too late to commence new customs prosecutions against the defendant in respect of any of the offences alleged. Section 249 provides that Customs prosecutions may be instituted at any time within five years after the cause thereof, and the implication is clear that they may not be instituted after the expiration of that period. In respect of most of the offences charged in this action the period had expired before the making of the consent order for settling the points of law, and it had expired in respect of all of them by the time *Williams* J. made the order now under appeal.

It is convenient to deal with the cross-appeal first. It depends on the meaning to be given to the expression "instituted in the name of the Minister" in s. 245. The full terms of that section are as follows: "Customs prosecutions may be instituted in the name of the Minister by action information or other appropriate proceeding—(a) In the High Court of Australia; or (b) In the Supreme Court of any State; and when the prosecution is for a pecuniary penalty not exceeding Five hundred pounds or the excess is abandoned the Customs prosecution may be instituted in the name of the Collector in (c) Any County Court, District Court, Local Court or Court of summary jurisdiction."

The view is no doubt correct upon which the defendant's argument proceeds, namely that s. 245 intends to make exhaustive provision upon the matters with which it deals.

The section was in the *Customs Act* 1901, and it has never been amended. The *Acts Interpretation Act* 1901, passed only three months earlier, provides by s. 17 (*i*) that in any Act, unless the contrary appears, " the Minister " shall mean the Minister for the time being administering the Act or enactment in which or in respect of which the expression is used. By s. 6 of the *Customs Act*, it is provided that until otherwise lawfully determined the *Customs Acts* shall be administered by the Minister of State for the Commonwealth administering the Customs; and by virtue of a definition in s. 4 " the Customs " means the Department of Trade and Customs. (I omit the alteration made by an order of 12th January 1956 under s. 19B of the *Acts Interpretation Act* 1901-1950, and confine myself to the position existing at the commencement of the present proceedings.) Consideration of the requirement that Customs prosecutions may be instituted " in the name of the Minister " need not be complicated by referring to ss. 19A and 19B of the *Acts Interpretation Act*, for they were not in existence when s. 245 was passed. Section 19 of that Act was in force, extending references to a Minister in any Act to include any Minister for the time being acting for or on behalf of such Minister. In this state of the relevant statutory provisions it is clear that in s. 245 " the Minister " meant in 1901 the Minister of State for the Commonwealth administering the Department of Trade and Customs or any Minister for the time being acting for him or on his behalf.

The provisions of the *Customs Act* which the defendant is alleged to have infringed are those contained in ss. 233 (1) (*c*), 234 (*d*) and 234 (*e*). They forbid, respectively, the exporting of any prohibited exports, the making of any entry which is false in any particular, and the making in any declaration or document produced to any officer of any statement which is untrue in any particular and the producing or delivering to any officer of any declaration or document containing any such statement. At the foot of ss. 233 (1) and of 234 appear the words " Penalty: One hundred pounds ". This, by force of s. 5, indicates that a contravention is an offence against the Act, punishable upon conviction by a penalty not exceeding the penalty so set out. Section 258 adds that where any pecuniary penalty is adjudged to be paid by any convicted person the Court may, *inter alia*, commit the offender to gaol until the penalty is paid. Whether or not such a prosecution is to be regarded for all or some purposes as of a criminal nature, at least

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it is clear that the prosecution is a Crown matter. Only the Crown in right of the Commonwealth is intended to have any interest in the conviction of the defendant and in the imposition and enforcement of any penalty imposed. Section 244, however, places customs prosecutions in a category apart from other Commonwealth prosecutions and litigation by committing their conduct to the Department of Trade and Customs. They are, the section says, " proceedings by the Customs ". It is a natural addition to make, indeed in a practical sense a necessary addition, that the prosecutor shall be, not the Commonwealth itself, nor the Attorney-General as the Minister who traditionally prosecutes for the Crown, but, in major cases at least, the ministerial head of the customs.

The requirement that prosecutions shall be " instituted in the name of the Minister " gives effect to this. It requires that the Minister administering the department shall be nominated in the proceedings as the party seeking the conviction. Of course the Act does not intend that he shall be more than a nominal party: the real litigant is the Crown in right of the Commonwealth: cf. *Laskey* v. *Runtz* (1). The expression " instituted in the name of the Minister " indicates the mode by which the Commonwealth is to sue in these cases: cf. *Kinloch* v. *Secretary of State for India in Council* (2) affirmed (3). Does it go further, and require not only that he shall represent the Crown but that in doing so he shall use his private appellation? There is nothing gained if it does, for in litigation which is in every substantial sense litigation by a Crown department it can hardly matter whether the court papers disclose the name which the nominal plaintiff bears in private life, so long as they show that he is the officer authorised to fill that role. Indeed, when a statute designates a Minister of the Crown for the purpose, and does so by reference only to his ministerial position, there is good reason for leaning strongly in favour of a construction which would authorise the use of the official name by itself; for the likelihood that changes in ministerial office may occur during the pendency of litigation is so obvious, and the inconvenience associated with substituting the name of a new Minister for that of a former Minister is so considerable and so clearly lacking in any compensating advantage, that a disregard of these things ought not readily to be attributed to Parliament.

It is not unimportant to observe that s. 245 is directed to larger concerns than the fine points of procedure. It deals with the choice of courts and the *locus standi* of officers to represent the Crown

(1) (1908) 24 T.L.R. 496, at p. 497.
(2) (1880) 15 Ch. D. 1, at pp. 8, 9.
(3) (1882) 7 App. Cas. 619.

in these matters. When the Act turns, as it does in s. 247, to the topic of procedure in customs prosecutions in the High Court or the Supreme Court of a State, it does no more than prescribe a blanket application of the rules of practice of the particular court for Crown suits in revenue matters, or the usual practice and procedure of the court in civil cases, or the directions of the court or a judge. The section provides that in accordance with these rules, practice, procedure and directions, customs prosecutions are to be not only prosecuted and proceeded with but commenced. It seems most unlikely that s. 245 intends to make in advance a qualification upon this, by descending to such a detail of procedure, and so inconsequential a detail at that, as the inclusion in the initiating process of the personal name of the individual who happens to be the Minister on the day the process is issued—leaving it to be decided as a matter of mere practice under s. 247 whether the name will have to be altered whenever a new Minister takes over the department.

These considerations, of course, could not override unambiguous words. But " instituted in the name of the Minister " can hardly be called unambiguous. A person may be described as " named " in an instrument, in some contexts at least, so long as he is specified or mentioned and even though his own name is not used : cf. *Seale-Hayne* v. *Jodrell* (1). It is true that in s. 245 there is no such specific provision as may be found in s. 152 (2) of the *Post and Telegraph Act* 1901 (Cth.), which provides that in all informations and complaints relating to the department it shall be sufficient to name and describe the Postmaster-General as " the Postmaster-General " without any further or other name addition or description. But even that provision serves to illustrate how the word " name " may be used to refer to an official name. Another provision of a similar description is to be found in s. 209 of the *Income Tax Assessment Act* 1936 (Cth.), which, significantly for present purposes, refers to the official title or description of the commissioner as his " official name ".

On the whole it seems much the better construction of s. 245 that the words referring to the name of the Minister simply indicate who is to be the nominal plaintiff for the Crown, leaving to the rules, practice and directions of particular courts the question how he shall be designated in the proceedings. I would therefore answer the first of the questions by saying that the present action is brought " in the name of the Minister " within the meaning of s. 245.

(1) (1891) A.C. 304, at p. 306.

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On this view of the matter, the second question does not arise. But it is material to consider whether the personal name of the Minister should be insisted upon as a matter of practice in this Court. I see no reason why it should be. Every consideration of convenience and economy in costs is against it, and much precedent besides. In my opinion the order for amendment of the proceedings in the present case is unnecessary and should be set aside.

The cross-appeal, in my opinion, should be allowed. Otherwise than by setting aside the order for amendment on the ground that it is unnecessary, the appeal should be dismissed.

TAYLOR J. I am of opinion that both the appeal and the cross-appeal should be dismissed.

Whilst I entertain no doubt that the word " name " may appropriately enough describe the official title of a Minister of the Crown I agree with *Williams* J., that this is not the sense in which it is used in s. 245 of the *Customs Act* 1901-1950. I should add that I agree substantially with the reasons which led his Honour to this conclusion but I wish to refer to certain additional matters which have influenced my decision.

Section 245 of the Act was first enacted in 1901 and there seems little doubt that it was modelled on s. 218 of the *Customs Consolidation Act* 1876 (Imp.) (substituted by s. 11 of the *Customs and Inland Revenue Act* 1879). By the terms of that section, which are set out in the reasons of my brother *Williams*, comprehensive provision was made with respect to the manner in which proceedings might be taken in specified courts for the recovery of duties of customs and penalties and for the enforcement of forfeitures. The proceedings contemplated were by action, information or " other appropriate proceeding " in such courts " in the name of the Attorney-General for England or Ireland respectively, or of the Lord Advocate of Scotland or of some officer of Customs or Excise ". It will readily be seen that, if advanced in relation to this section, the argument of the respondent would be untenable for the section requires that the word " name " be understood not only in relation to the respective holders of the offices of the Attorney-General for England or Ireland and the Lord Advocate of Scotland but also in relation to " some officer of Customs or Excise ". The latter expression may be said to constitute a description but on no view can it be regarded as a name so that the reference to the name of some such officer must constitute a reference to his proper or personal name. That circumstance, I think, provides a clue to the sense in which the word " name " was used and no reason appears for

supposing that the reference to the " name " of the respective Attorneys-General and the Lord Advocate had a different signification. Indeed consideration of the method of procedure by indictment leaves no doubt that a consistent interpretation was intended.

It may, of course, be urged that the true meaning of s. 245 of the *Customs Act* is not to be ascertained by the process of construing the English provision and, then, by attributing the same meaning to the local enactment. No doubt that is a proposition which must be assented to at once. But when it is seen that s. 245 itself erects a difficulty of the same character in the way of the appellant much of the same reasoning must apply in ascertaining its true meaning.

As already appears, s. 245 was originally enacted in 1901 and it was to be found in Pt. XIV of the Act as it then stood. That Part of the Act contained a number of special provisions dealing with customs prosecutions. By s. 245 it was provided that customs prosecutions might be instituted in the name of the Minister by action, information or other appropriate proceeding in the High Court of Australia or in the Supreme Court of any State, and when the prosecution should be for a pecuniary penalty not exceeding £500, in the name of the collector in any county court, district court, local court or court of summary jurisdiction. Unlike the English Act it contains no express reference to the " name " of any person described merely in general terms and it may, therefore, be argued that there is nothing in the section to exclude the view that it authorises, or permits, the institution of proceedings in the official names of the persons occupying the designated offices. But by s. 17 (*i*) of the *Acts Interpretation Act* 1901, which became law a few months before the *Customs Act*, the word " Minister " was defined to mean, unless the contrary intention should appear, the Minister for the time being administering the Act or enactment in which or in respect of which the expression is used. Accordingly it has been held that a provision that offences against the *War Precautions Act* 1914-1916 should not be prosecuted upon indictment except in the name of the Attorney-General did not preclude prosecution upon indictment in the personal name of the Minister for Works and Railways of the Commonwealth of Australia who was said to be acting for the time being for and on behalf of the Attorney-General of the Commonwealth : *R.* v. *Judd* (1). On the other hand the extended meaning of the expression " Collector ", as appearing in the definition section of the *Customs Act*, has been held not to apply to s. 245 : *Christie* v. *Permewan, Wright & Co. Ltd.* (2). By definition the word " Collector " included, except

(1) (1919) 26 C.L.R. 168.

(2) (1904) 1 C.L.R. 693.

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where otherwise clearly intended, the Comptroller and any Collector of Customs for the State and any principal officer of customs doing duty at the time and place and any officer doing duty in the matter in relation to which the expression is used. Clearly if the extended meaning did apply precisely the same situation would arise as in the case of s. 218 of the English Act. But even though it does not apply there is sufficient in the fact that the word " Minister " is to bear the extended meaning given to it by the *Acts Interpretation Act* to enable it to be said that the word " name " was intended as a reference to a proper name, that is to say, to the name of the Minister of State for Trade and Customs or of any Minister for the time being administering the *Customs Act*. Perhaps it may be said that this view is again capable of some reinforcement by a consideration of the practice by which proceedings upon indictment are instituted in the name of the Attorney-General.

Understood in this sense s. 245 bears a marked resemblance to s. 69 of the *Judiciary Act* 1903-1955. This section, which was enacted in 1903, provides that indictable offences against the laws of the Commonwealth shall be prosecuted by indictment in the name of the Attorney-General of the Commonwealth or of such other person as the Governor-General appoints in that behalf. There can be no question, I should think, that this section contemplates the use of the personal name of the Attorney-General or of such other person who may have been so appointed. But there is a marked dissimilarity between ss. 245 and 44 of the *Income Tax Assessment Act* 1915 (now ss. 208 and 209 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1956) which provided that income tax should be deemed on becoming due and payable to be a debt due to the King on behalf of the Commonwealth and payable to the commissioner in the manner and at the place prescribed and, further, that any income tax unpaid might be sued for and recovered in any court of competent jurisdiction by the commissioner or a deputy commissioner suing in his *official* name. (See also s. 221YDB (1A) (2).) However when special provisions with respect to taxation prosecutions were inserted in the *Income Tax Assessment Act* 1922 (now ss. 233 to 251 of the *Income Tax and Social Services Contribution Assessment Act*) it was provided that taxation prosecutions might be instituted in the name of the commissioner by action, information or other appropriate proceeding in the High Court of Australia or in the Supreme Court of any State and, in the case of prosecutions for a pecuniary penalty not exceeding £500, in the name of the deputy commissioner in a county court, district court, local court or court of summary

jurisdiction. These provisions, no doubt, were adapted from the provisions then appearing in Pt. XIV of the *Customs Act* and the deliberate choice of the word " name " for one purpose and of the expression " official name ", for the other is not without significance.

In my view *Williams* J., was right in holding that s. 245 does not authorise the taking of proceedings in the official name of the Minister but this does not constitute a fatal objection to the maintenance of the suit. The right to recover the penalties sued for is a right which belongs to the Crown and, in the absence of a provision such as s. 245, they would be recoverable only at the suit of the Crown. In substance, however, s. 245 authorises the Minister to proceed on behalf of the Crown but it does not authorise any departure from the ordinary rule in proceedings such as the present that the plaintiff should sue in his own name. Failure to observe this rule amounted, in my opinion, to nothing more than the misdescription of the appropriate plaintiff. Accordingly, I entertain the view that it was proper to grant leave to amend.

For the reasons given, both the appeal and the cross-appeal should be dismissed.

Appeal dismissed. Cross-appeal dismissed. Defendant-appellant to pay costs.

Solicitors for the appellant, *Roscoe W. G. Hoyle & Co.*

Solicitor for the respondent, *H. E. Renfree*, Crown Solicitor for the Commonwealth.

J. B.