RECENT CASES

CONTRACTS WITH THE CROWN.

NEW SOUTH WALES v. BARDOPLH [1935] A.L.R. 22.

In order to safeguard Parliamentary control of finance as against the Executive, the courts have evolved the doctrine that a contract with the Crown involving the provision of public funds is unenforceable, in the absence of Parliamentary appropriation. Thus, without Parliamentary appropriation no judgment could be given on the citizen's claim. In the view herein acted on by the High Court, it appears that where—as in Australia—there are Statutes imposing contractual liability on the Crown the courts may proceed to judgment regardless of the existence or non-existence of Parliamentary appropriation.

Attention should be given also to the decision of the trial judge, Evatt J. Though he applied to the case the rule as hitherto understood, he decided an important point not raised in any of the Privy Council decisions, and reached thereon a conclusion with which, on appeal, the majority of the Court agreed. What he had to decide was the kind or mode of Parliamentary provision necessary to make such a contract enforceable: was it necessary to show an appropriation expressly mentioning the relevant services, or would some more general and inclusive form suffice.

Mr. Lang's government in New South Wales had contracted with Bardolph, the proprietor of a newspaper called the *Labour Weekly*, for the insertion of a weekly advertisement in relation to the Government Tourist Bureau. Upon entering office in May, 1932, Mr. Stevens' government notified Bardolph that it was not intended to utilize any further space in his paper for advertising. Assuming the contract to have been a proper agreement, made in good faith, this was a completely unmeritorious proceeding. During the remaining eleven months of his contract, Bardolph continued to insert advertisements, and then brought his action to recover payment.

Evatt J. gave judgment for plaintiff. He held that, in a case of this kind, appropriations for "government advertising and issue of government publications" and for "publicity for all departments" were sufficient to render the contract enforceable. This is a welcome addition to the authorities. A contrary decision would have made shipwreck of the whole current system of Parliamentary appropriation. Further, as his Honour remarked, the decision is sufficient to show "that the repudiation of subsisting agreements by a new administration can seldom be ventured with success."

On appeal, the Full Court affirmed the order made by Evatt J., but on the wide ground already indicated. Gavan Duffy C.J., Rich and Starke JJ. appear all to share the view, stated most fully in the judgment of Dixon J., that in Australia the whole question is determined by the existence of statutes imposing contractual liability upon the Crown: the Judiciary Act, Part IX, in the Commonwealth, the

Crown Suits Act in New South Wales, the Crown Remedies and Liability Act in Victoria. It would defeat the very object of these Acts if, before the courts could pass upon its validity in other respects of the subject's claim against the Crown, it were necessary that Parliament should vote the moneys to satisfy it. The contract is thus, in the absence of Parliamentary appropriation, not "unenforceable," in the ordinary sense. Parliamentary appropriation is not a condition preliminary to judgment upon the contract. The relevant Acts imposing liability on the Crown do, however, leave Parliament, legally speaking, in ultimate control of the situation. For it is only out of moneys legally available for the purpose that the Acts authorize the Treasurer to satisfy a judgment thus given against the Crown. In this view, therefore, it was unnecessary for the Court to undertake the elaborate examination of the Parliamentary appropriations which Evatt J. had made.

Two constitutional matters call for comment (apart from the relation of this decision to the earlier cases, a matter too complex for discussion within space-limits already fully occupied). First, the decision alters, in favour of the individual citizen, the balance hitherto struck, in the matter of contracts, between legislature and executive. Hitherto it was a case of "caveat contractor." The making of contracts is clearly a function of the executive government, not of Parliament. But the citizen could not get an enforceable contract with the government unless and until Parliament provided the necessary funds. He will now be able to get an actual judgment, and his moral claim on Parliament will be by so much the stronger. The spectacle of a Parliament refusing the funds necessary to satisfy a judgment of the courts is not a pleasant one to contemplate, though that will be Parliament's only means, at that stage, of keeping control of public funds. Perhaps the rule now laid down will lead to an extension of Parliamentary control at an earlier stage.

Second, the decision does not render totally unnecessary the enquiry whether Parliament has in fact made an appropriation for the purpose, but only postpones the stage at which that question arises, and alters the form in which it will be presented. Under the Australian Acts, the citizen will no doubt be met in such cases by a refusal on the ground that no funds are legally available to satisfy a judgment given, and he will claim accordingly a declaration that funds are legally available to satisfy it. On that point, the rule laid down by Evatt J. remains of substantial interest and importance.

K.H.B.

REVIEW OF QUASI-JUDICAL FUNCTIONS.

ERRINGTON v. MINISTER FOR HEALTH [1935] I K.B. 249.

This case is the latest example of judicial review of the action of a public department exercising quasi-judicial functions; and it affords a clear demonstration of the fact that the description of the necessary ingredients of a quasi-judicial function set out in the

Report issued in 1932 of the English Committee on Ministers' Powers is having its unacknowledged effect on the Courts. Admittedly this description was founded on such leading cases as that of the *Board of Education v. Rice*;[1] but the Committee's generalisations on such cases have been almost bodily lifted and placed in *Errington's Case.*

The *Housing Act, 1930,* provides for the delineation by municipal councils when satisfied of certain matters, of prospective slum clearance areas; thereupon anyone interested may object to the clearance; if objections are lodged, a public local inquiry is to be held by an officer of the Ministry of Health, at which inquiry all objections are to be considered; the Minister is to consider the report of the officer holding the inquiry, and may then confirm the order. In this case the Jarrow Council formulated a scheme and there were objections. The inquiry was held, and during its course negotiations were instituted for a compromise. After its close, these negotiations went on, but the Council eventually retreated to the position of refusing to accede to any suggestions. In answer to communications from the Ministry, it then brought forward new arguments that had not been touched on at the inquiry, and the Ministry, without communicating these new arguments to any of the parties concerned, eventually ratified the scheme. The property-owners protested that the ratification was invalid. Swift J. decided against them, but the Court of Appeal (Greer, Maugham, and Roche L.JJ.), which is the final appellate Court under this part of the Act, reversed his judgment.

The ground of the judgments of the Court of Appeal was that the Minister had been entrusted by the Act with quasi-judicial functions, and had not exercised them properly. Maugham L.J. rather boggled at the new term "quasi-judicial"—"I do not like using words the meaning of which I do not know"—but with the other judges he consented to accept its existence, and followed its meaning as set out in *Board of Education v. Rice,*[2] and more particularly—though they did not mention it—in the Report of the Committee on Ministers' Powers. The Report described a quasi-judicial process as one in which the facts, relevant to the matter in dispute, had to be obtained, and after considering them the person or body holding the inquiry could at his discretion come to any decision or to no decision at all. In finding the facts, the strictly judicial procedure of a Court need not be adopted, but each side must be given practical opportunities to place its facts or opinions before the quasi-judicial body, and it must be given opportunity to refute the arguments of its opponents.

The Court of Appeal in this case said exactly the same; the fact that the objections of property-owners were to be considered, and that the scheme might *then* be approved, made the Ministry's function, they said, quasi-judicial; that being so, they were compelled to hear

1. [1911] A.C. 179. 2. [1911] A.C. 179.

all relevant arguments, and to confront each side with the arguments of the other, though not necessarily at the public inquiry itself. Here the property-owners had not been faced with the last piece of evidence the Council had adduced; in the absence of evidence to the contrary, it must be assumed that this evidence had swayed the Ministry; and so the quasi-judicial function of the Ministry had not been properly carried out.

It almost seems as if the judges of the Court of Appeal had copies of the Report of the Committee on Ministers' Powers open before them as they wrote their judgments; the tests of the Report are their tests.

Before leaving the subject, it is interesting to note the hair-line of logical distinction drawn by Swift J. in this case. His judgment is not reported, but in *Frost v. Minister of Health*[3] he explained more in sorrow than in anger his *ratio decidendi* in *Errington's Case*.[4] He said that the function of the officer sent out to hold the public inquiry was quasi-judicial; but, when his report was sent to the Minister, the latter had to consider no objections at all if he didn't want to, and if he came to a decision it was a purely administrative one. This line of argument seems especially unreal when we consider that the Minister himself, whose the decision formally was, had probably never heard of the case.

A.T.P.

3. [1935] 1 K.B. 286.
4. [1935] 1 K.B. 249.

DAMAGES FOR PERSONAL INJURIES.

FLINT v. LOVELL [1935] 1 K.B. 354.

The difficulties in principle and practice of estimating damages for personal injury are well exemplified in this case. Plaintiff was an active man of 70 years who was so injured by the negligence of defendant that he was not expected to live very long—probably something under a year. Acton J. took into account the fact that plaintiff had lost the prospect of an enjoyable and vigorous old age, and awarded as general damages £4,000. Greer and Slesser L.JJ. upheld the judgment, but Roche L.J., while doubting whether the head of damage above mentioned should be separately considered, thought that in any case the damages were so excessive as to warrant interference by the Court of Appeal. An attempt was made by the appellant to invoke the rule in *Baker v. Bolton*,[1] but the majority had little difficulty in deciding that the rule was inapplicable. It is a historical anomaly to be strictly interpreted, and though Roche L.J. suggests that a logical development of the rule would render it applicable in the present case, it is submitted with respect that the logical development should proceed from the general principles of compensation in tort rather than from a stubborn anomaly. Further there is a clear distinction between damages for the shortening of

1. [1808] 1 Camp. 493.

plaintiff's own expectation of life and damages for loss resulting to A from the death of B.

We have, however, to consider whether the general principles of compensation provide for this head of damage, and how it is to be assessed. In *Kramer v. Waymark*[2] plaintiff was a child of seven injured by the kick of a horse. The jury found a verdict for £150. The child died before judgment was signed by his next friend. Held that although the damages were presumably given on the supposition that the child would continue to live, the Court should not grant a new trial. (The change in the legal idea of reasonable damages since that time is apparent when we note that though the child had severe and painful head injuries which would probably incapacitate him from ever obtaining a living in the ordinary way the question was seriously considered whether the damages were excessive). In argument Bramwell B. seems to assume that the damages would rightly have been *less* if the jury had thought that the child would speedily die.

A leading case on damages for personal injury is *Phillips v. L. & S.W. Railway*.[3] The case was one in which a successful surgeon was crippled and his life almost certainly reduced. Cockburn C.J. enumerates the heads of damage which the jury should consider, but does not mention the reduction of Plaintiff's prospect of life. Field J. in a direction to the jury which was upheld on appeal, warned them that "it is wrong to attempt to give an equivalent for the injury sustained." But he went on to say that "an active energetic healthy man is not to be struck down almost in the prime of life and reduced to a powerless helplessness with every enjoyment of life destroyed, and with the prospect of a speedy death without the jury being entitled to take that into account not excessively, not immoderately, not vindictively but with the view of giving him a fair compensation for the pain inconvenience and loss of enjoyment which he has sustained." He directed the jury in estimating compensation for lost earnings to remember, e.g., that an accident might have taken plaintiff off within a year. It is submitted then that to direct a jury to assess damages for the loss of the prospect of an enjoyable life would generally lead to excessive damages, excessive, i.e., as a matter of public policy. In any case the damages would generally enure for the benefit of relatives who might or might not be entitled to recover in the event of death under Lord Campbell's Act. There seems at present to be no better way of directing the jury than that employed by Field J. of asking what is a reasonable compensation for the injury in all the circumstances. And while the decision in *Flint v. Lovell* is acted on it will often be more economical for defendant to kill his man outright than to do him an injury which proves fatal only after he has had time to get a judgment.

C. K. COMANS, LL.B.

2. [1866] L.R. 1 Ex. 241.
3. 4. Q.B.D. 406 affirmed 5 Q.B.D. 78.

BURNING OFF.

HAZELWOOD v. WEBBER [1935] A.L.R. 76.

The paramount question decided in this case was whether burning off stubble in the course of ordinary farming operations, is a natural user of land within the meaning of the rule in *Rylands v. Fletcher.*[1] The fire lit by the defendant for the purpose of burning off nearly 100 acres of stubble, emitted sparks which were blown by the wind and set on fire the buildings, fences, and grass on the plaintiff's land. It was held by Gavan Duffy C.J., and Dixon and McTiernan JJ.[2] "that apart from statute, the common law imposes upon the occupier of land, who uses fire upon it, a *prima facie* liability which was independent of negligence. . . ." It was contended on behalf of the defendant that the use of fire for burning off stubble "is a thing beneficial to the land which many farmers do." The counsel for the plaintiff quoted *Rickards v. Lothian*[3] to show that the defendant was liable apart from any negligence for "some special use bringing with it increased danger to others." The extent of the "hazard" to others in the use of fire ("He must at his peril take care that it does not through his neglect injure his neighbour."[4]), the damage to property it is likely to cause and the difficulty of controlling fire were the other factors stressed in the judgment. The whole tenor of *Hazelwood v. Webber*[5] is in harmony with the case of *Black v. Christchurch Finance Co.*,[6] in which the defendant company was held liable in damages for the act of an independent contractor in negligently and improperly lighting a fire on its land and allowing it to destroy the plaintiff's property. *Sheehan v. Park*[7] was cited with approval: "If a person choose to bring fire into an arid place he does so at his own risk, and the question whether he was or was not guilty of negligence does not arise"—per Stawell C.J.[8]

Mr. Justice Starke in his judgments points out that the law relating to the user of land must change and develop from one generation to another, and the learned judge referred to, and apparently agreed with, the view expressed by Beven[9] that "what constitutes a natural user of land in law must be a matter to be determined in each case rather by what is customary and suitable to the particular circumstance of place than by any certain rule." Mr. Justice Starke is disposed, however, to introduce an important qualification to the statement of Beven quoted above. "But burning off stubble . . . is attended with great danger, and I cannot agree that such an operation is an ordinary or natural user or reasonable use or enjoyment of land, even if 60 or 70 per centum—or all—of the farmers in the district . . . take the risk.[10]

1. (1868) L.R., 3 H.L. 330.
2. (1935) A.L.R., at 77.
3. [1913] A.C. 263.
4. 12 Mod. at 152.
5. [1935] A.L.R., 76.
6. [1894] A.C. 48.
7. (1882) 8 V.L.R. (L.), 25.
8. (1882) 8 V.L.R., at 28.
9. Beven on Negligence, 4th Ed., p. 608.
10. [1935] A.L.R. at 79.

In Canada the Courts have been anxious to relax the effects of the rule in *Rylands v. Fletcher,* and have "uniformly held that where the fire was started for the purposes of husbandry the land occupier who started the fire was not responsible for any damages caused by its spread unless negligence in the supervision of the fire was established."[11] The reasons for this attitude of the Canadian Courts towards "burning off" is that in a new country, not closely settled, the application of the doctrine of absolute liability is likely to discourage "the desired and essential economic development."

The High Court of Australia has adopted a different view, and the importance of *Hazelwood v. Webber* is that it thus clarifies the law relating to "burning off" in Australia, and greatly limits the conception that burning off should be regarded as a natural user of land merely because it is in the interests of husbandry.

J. SHATIN, B.Com.

11. [1933] XI. Canadian Bar Review, p. 94.

VALIDITY OF BY-LAWS.

EX PARTE COTTMAN, RE McKINNON—35 N.S.W., S.R. 7.

This case is an appeal from a judgment refusing an Order Nisi for a Writ of Prohibition. The appellant had been convicted of an assault upon a police officer. In fact the assault occurred while the appellant was resisting arrest by the police officer for an alleged contravention of a by-law relating to the Sydney Domain. The Public Parks Act 1912, section 9 (1) (c) empowers the trustees of park lands to make by-laws "regulating the use and enjoyment of such land." Pursuant thereto the trustees made a by-law providing that "no person shall sell or expose or offer for sale any article, and no person shall distribute any printed or typed or written matter whatsoever unless authorized in writing by the Commissioner of Police."

The appellant attacked the by-law on the grounds that it was outside the ambit of the by-law making power insofar as it prohibited and did not merely regulate certain acts, that it was unreasonable, and that it was invalid as involving a delegation by the trustees of a portion of their powers of control to the Commissioner of Police.

The Chief Justice delivered the only judgment in the case, and this was concurred in by Davidson and Stephen JJ. He pointed out that the test of the validity of a by-law is whether it is within the scope of some power to make it. Whether or not in the opinion of the Court the by-law is reasonable is immaterial except insofar as it tends to show that it is not within the scope of the granted powers. Unreasonableness, therefore, may be evidence that there has been an abuse of power in making the by-law. His Honour proceeded then to examine the cases with respect to the difference between "regulation" and "prohibition." He draws the familiar distinction between the nature of these two powers, namely, that merely because

a by-law prohibits a certain class of action with respect to the subject matter of the power it by no means follows that the by-law, in a more extended sense, does not regulate the subject matter. He says "No universal test can be laid down for determining the validity of such a regulation. The question in each case is whether the purported regulation is really only regulative or is substantially prohibitive. . . . But a regulation which prohibits wholly or substantially the doing of a class of things which may be regulated is necessarily *ultra vires.*" If this condition exists the fact that the prohibition may be relaxed either by that body or by some other person or body does not mend matters. Where, however, it is within the ambit of the granted power wholly to prohibit the doing of a class of acts it is no necessary objection that the prohibition may be waived by some person or body. He found in this case that the prohibition was in essence such a one as might properly be made in view of the nature of the subject matter to be controlled, and that in fact the by-law was one of regulation. He, therefore, dismissed the appeal.

The main interest in this case lies in the fact that it brings out clearly the limitations of the ground of unreasonableness with respect to by-laws and regulations. At the best it is evidence only that the by-law is without the ambit of the granted power or that there has been an abuse of power; beyond this, it is irrelevant. The case is useful also by reason of the copious citation of recent decisions.

P.G.W.