

## CONSTITUTIONAL LAW: THE "SHIELD OF THE CROWN."

A decided attempt was made by the Full Supreme Court<sup>1</sup>, in *Victorian Railways Commissioners v. Herbert*,<sup>2</sup> to limit the protection given to public incorporated authorities by the "shield of the Crown." The Commissioners had leased shop premises to the defendant and sought to eject him. Their right to do so depended on whether the Commissioners were bound by the *Landlord and Tenant Act* 1948. The Magistrate considered himself bound by *Victorian Railways Commissioners v. Greelish*<sup>3</sup> and held the Commissioners entitled to the immunity expressly conferred upon the Crown by section 5 of the Act. On an order to review, the Full Court overruled *Greelish's Case* and held that the Commissioners were bound by the Act.

Gavan Duffy J. decided, in *Greelish's Case*, that the Railways Commissioners, in accordance with the *Railway Servants' Case*,<sup>4</sup> were an instrumentality of the State and as such were entitled to the immunity of the Crown.

The Court, in *Herbert's Case*, explained that the *Railway Servants' Case* was concerned with the distribution of powers within the Federal system. Though accorded immunity in that case, it was stressed that this immunity was due to the nature of the function that the railways performed, the fact of their management and operation by independent statutory corporations being for this purpose irrelevant. Thus the decision in the *Railway Servants' Case* is not applicable in cases like the present, and *Greelish's Case* was expressly overruled.

The basis of the decision of Gavan Duffy J. seems to proceed on the assumption that the Commissioners either represent the Crown or they do not. If they represent it for one purpose they represent it for all and vice versa. The Court in *Herbert's Case* rejected this method of approaching the question, stating that "where statutory bodies are set up to conduct governmental undertakings it may be that they should be treated as representing the Crown, or as agents of the Crown, for one purpose and not for another."<sup>5</sup>

In this way the Court was able to circumvent such decisions as *In re Oriental Holdings Pty. Ltd.*<sup>6</sup> inasmuch as an authority may be denied the Crown's immunity in tort yet able to claim the Crown's priority for debts owing to it.

The frequently criticised test of Blackburn J. laid down in *The Mersey Docks Trustees v. Gibbs*<sup>7</sup> that immunity depends on whether the corporation exercises a governmental or non-governmental function was recognised by the Court, but it was emphasised that before the established tests are applied, regard should be had to the particular aspect of the corporation's functions to which the immunity claimed is related. As said above, a public authority possesses a multitude of functions and when a particular function or aspect of the corporation is in question the

1. Herring C.J., Lowe and Fullagar JJ.

2. [1949] A.L.R. 440.

3. [1947] V.L.R. 425; [1947] A.L.R. 527.

4. [1906] 4 C.L.R. 488.

5. [1949] A.L.R., at p. 443.

6. [1931] V.L.R. 279; [1931] A.L.R. 266.

7. (1866) L.R. 1 H.L. 93.

law relating to that function, including statutory provisions, must be considered. In *Grain Elevators Board (Victoria) v. Dummunkle Corporation*,<sup>8</sup> the function or aspect of the public authority under consideration was the nature of the Board's interest in land and Dixon J. immediately asked how the property was vested in the Board and for what purpose—he refused to adopt the test of whether the Board was an agency of the Crown.

So here the Court applied the provisions of the *Landlord and Tenant Act* 1948 to the Commissioners in their capacity as lessors, and asked whether they were, in that capacity, representing the Crown, replying that—"the answer would seem to depend rather upon notions of property than upon the relationship of the Commissioners to the Government or the nature of the public function they perform."<sup>9</sup>

However the immunity of the Crown would have applied had it been, as in *Minister for Works (W.A.) v. Gulson*,<sup>10</sup> Crown land which had been leased, instead of land belonging to the Commissioners.

This case spotlights the modern attempt by Courts to minimise the irrational result arrived at by extending the "shield of the Crown" to independent public incorporated authorities which carry on activities formerly exercised by private enterprise. However, on the debit side, this new approach tends to complicate the law by substituting for the one investigation to determine whether or not the authority is entitled to immunity for all purposes, investigations of each of its purposes to determine whether with regard to that particular purpose the authority is to have immunity.

Although this case shews a healthy judicial dislike of the archaic application of the doctrine of the "shield of the Crown" to the present social system, improvements effected by the Courts can be piecemeal only and the final solution lies in systematic legislation.

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8. (1946) 73 C.L.R. 70; [1946] A.L.R. 273.

9. [1949] A.L.R., at pp. 443-4.

10. (1944) 69 C.L.R. 338; [1944] A.L.R. 349.

(Premises of which the Victorian Railways Commissioners are the lessors subsequently were excluded from the operation of Parts II. and III. of the *Landlord and Tenant Act* 1948 *vide Gazette* No. 450, 25/5/49—Eds.)