CONSTITUTIONAL AND ADMINISTRATIVE LAW

Locus Standi to Sue for Declaration of Invalidity.

The traditional distaste of British judges for answering hypothetical questions was given voice by the majority of the High Court in *Australian Boot Trades Employees' Federation v. The Commonwealth*[1]. The union and a branch secretary brought the suit against the Commonwealth, the Attorney-General, and the Minister for Labour for a declaration that s. 78 of the Conciliation and Arbitration Act 1904-1951 was invalid and an injunction restraining the defendants from enforcing the section against any servant, agent, or officer of the union. Sec. 78, enacted in 1951, was designed to prevent union officers from encouraging strikes or "go slow" methods or other conduct by employees in breach of, or calculated to obstruct the operation of, an industrial award. A wide variety of conduct of that kind by union officers was made punishable by fine. No prosecution under the section was pending or threatened against any officer of the plaintiff union.

Dixon C.J. and Fullagar J. were prepared to declare that the section, in its main features, was a valid law, but the other judges, Webb J., Kitto J., and Taylor J., declined to answer any of the questions in the case stated by Fullagar J. for the Full Court. The majority took the view that as there was no evidence that the present activities of the officers of the union were in any way hampered by the provisions of s. 78, the question raised was a merely abstract or hypothetical one which, as in the case of *Luna Park Ltd. v. The Commonwealth*[2], should not be considered.

Although there is a long line of respectable authority, both in England and in Australia, for courts' declining to resolve hypothetical problems, in Australia the High Court has tended to be very liberal in entertaining suits claiming declarations of invalidity of legislation under the Federal Constitution. As Fullagar J. said in the case under review, "Suits not glaringly dissimilar in character have been entertained on very many similar occasions in the past." Such suits have been allowed even at a stage before any steps have been taken to put the impugned legislation into operation[3], and even indeed before the Act has been proclaimed[4]. As Latham C.J. said in *Toowoomba Foundry Pty. Ltd. v. The Commonwealth*[5], "It is now, I think, too late to contend that a person

1. [1954] A.L.R. 321.
2. (1923) 32 C.L.R. 596.
3. E.g. *Banks Case* (1948) 76 C.L.R. 1; *Communist Party Case* (1951) 83 C.L.R. 1.
4. *Pharmaceutical Benefits Case* (1945) 71 C.L.R. 237.
5. (1945) 71 C.L.R. 545 at 570.

who is, or in the immediate future probably will be, affected in his person or property by Commonwealth legislation alleged to be unconstitutional has not a cause of action in this Court for a declaration that the legislation is invalid."

It is clear, then, that the Court has often considered questions which are hypothetical in the sense that the interests of the plaintiff are affected only if and when the legislation is put into operation. However, in this context the important words of Latham C.J.'s dictum may be italicised thus: ". . . . a person who is, or *in the immediate future probably will be*, affected in his person or property . . ." In the cases cited above, as a matter of public knowledge if not of actual evidence, it was clear enough that the interests of the plaintiffs probably would be affected in the immediate future. That was perhaps not so clear in the case under review.

This case leaves open the question on which there was a difference of opinion between Latham C.J. and Williams J. on the one hand, and Starke and Dixon JJ. on the other, in *Crouch v. The Commonwealth*[6], whether the fact that a prosecution has been instituted against the plaintiff gives him sufficient *locus standi* to sue for a declaration of invalidity of the legislation. Kitto J. was emphatic that an *injunction* could not be claimed in such circumstances[7], but no definite pronouncement was made by any of the judges on the question so far as a mere declaration is concerned, though it would seem to be implicit in Webb J.'s judgment that he would regard the launching of a prosecution as providing sufficient *locus standi*.

Ross Anderson*

CONTRACT.

Formation of a Unilateral Contract.

The "unilateral" contract (to use a convenient but misleading American term to describe a contract which from its inception is fully executed on one side: the *Carbolic Smoke Ball Case*[1] immediately leaps to mind) is a familiar type which has certain incidents peculiar to itself. The nature and the essential elements of the contract have received considerable exposition from writers of text-books and journal articles. The leading judicial exposition

6. (1948) 77 C.L.R. 339.
7. [1954] A.L.R. at 333.
1. [1893] 1 Q.B. 256.

*M.A. (Oxford), LL.B. (Western Australia); Chief Lecturer in Law in the University of Queensland; contributing author of *Essays on the Australian Constitution*