NOTES AND COMMENTS

TORT—INTERFERENCE WITH TRADE OR BUSINESS—LIABILITY OF THE COMMONWEALTH.

James v. The Commonwealth[1] raises so many issues that a volume might well be written to debate them. The plaintiff sued the Commonwealth claiming £25,000 damages in respect of the general loss to his business caused by the administration of the Dried Fruits Act, such act having been declared invalid by the Privy Council.

First there was raised, almost as if for a moot, the problem of "*ultra vires*" torts. Was it a valid defence that, as the Commonwealth had no power to enact the legislation in question, and therefore no capacity to give authority to the various Dried Fruits Boards to act in its name, the act of the Boards could not be imputed to the Commonwealth? This is in effect the argument that Goodhart employs.[2] The question being entirely one of power or capacity, a previous order to a servant or subsequent ratification of what a servant has done cannot cure a lack of capacity which is imposed by the law. Dixon, J., held that once there is found a *de facto* authority from the Crown acting in right of the Commonwealth, within the scope of which an alleged tort is committed, then the defence of *ultra vires* cannot be pleaded in tort. This particular decision may well depend on principles that are peculiar to public law but it is interesting to note that in private law the doctrine of "*ultra vires* torts" is falling into general disapproval where the employment, within the scope of which the tort is committed, has been directed by the primary representatives of the corporation.[3] An American author says that the "overwhelming weight of American authority" rejects the doctrine.[4] Goodhart's view is a precise example of closely-reasoned thought, but in these post-classical days, his doctrine is regarded as creating injustice for the sake of *elegantia iuris*. In tort, the functional theory is more popular than in some other branches of the law, and, since the principles of tortious liability are so devoid of logical cohesion, another anomaly need not startle us.

Then the doctrine of breach of statutory duty was advocated by the plaintiff; section 92 gave the plaintiff a right to conduct his trade without obstruction by the Federal Government and this right had been broken. But Dixon J. countered this by saying that, standing in the constitution as it does, section 92 should not be construed as dealing with the private rights of individuals under the civil law. Its real object is to deny power, authority and competence to Governments and he refused to apply to the provisions of a constitution the principles used in spelling a private cause of action out of a statutory prohibition. The real test adopted in tort is the general intention to be gathered from the statute as a whole and undoubtedly the language of a constitution does not favour a pre-

1. (1939) A.L.R. 140.
2. Goodhart, Essays in Jurisprudence, 91.
3. Salmond, Torts (9th ed.) p. 58-9: Cf. Winn, 3 C.L.J. 398: Winfield, Tort, p. 114.
4. Harper, Law of Torts, 1933, 654.

sumption that it is the intention to give an action in tort to anyone injured by an invalid exercise of a power.

Thirdly, as was inevitable, one of the so-called general principles of liability was brought forward—that any interference with another's trade or livelihood is *prima facie* actionable. Dixon J. approved the more generally accepted view that there is no such general principle and that even a specific intention to injure does not make actionable an interference by *one person* with the trade or business of another. Evatt J. adopted the same theory in *McKernan v. Fraser*.[5] But there are difficulties in this view. Firstly, there cannot be found a clear majority for it in *Sorrell v. Smith*,[6] for three of the Lords, after elaborating many difficulties, gave inconclusive replies. Secondly, the view makes a clear-cut distinction between the act of one and the act of two or more, but the treatment of a powerful corporation as one person deprives the doctrine of its only possible justification—the fact that an individual may stand against one but may easily fall under organised attack. Thirdly, in dealing with agreements of two or more, it in effect asks whether a soldier shoots to kill the enemy or to protect himself, for in modern business the destruction of a rival may be the best self-protection. Do we often find the "disinterested malevolence" necessary? Perhaps in private life, but hardly in business which cannot afford the luxury of malevolence unless in pays. In this case, the Government was more powerful than any corporation, but Dixon J. found that, even if one took the view that the Government was a plurality, its dominant motive was not to injure but merely to carry out the regulations. Hence it must be proved that the Commonwealth used unlawful means.

Lastly there arose the ghost of *Lumley v. Gye*.[7] To sustain a plea of unlawful means, it was argued that unlawful threats were used to shipowners to deter them from handling plaintiff's goods, and that the Government had induced common carriers to commit a breach of duty in refusing to accept plaintiff's dried fruits. But there was no proof that any express threat was made, nor was there any evidence that the owners of any ship trading between Adelaide and other Australian ports had assumed the character of common carriers. Undoubtedly, it would be a tort for Smith to induce a common carrier to break his duty to accept Jones' goods for carriage, unless the inducement could be justified or excused. But was not a *bona fide* execution of the law as upheld at the time by the Courts just cause? "I do not think that a bona fide assertion as to the state of the law and an intention to resort to the Courts made known to the third party can be considered a wrongful inducement or procurement."

In the result the plaintiff recovered only for conversion of certain parcels of goods which had been actually seized, the damages being £878. The case illustrates the vitality of the law of torts as is shown by the various causes of action that could be treated as applicable to the same set of facts: the many points of obscurity that even to-day surround not

5. (1931) 46 C.L.R. at 379-380.
6. (1926) A.C. 700.
7. 2 E. & B. 216.

only the fundamental theories of tort, but its practical application: and the difficulties that still beset the path of him who sues the Crown in tort.

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LEGAL REALISM.

If Professor Jerome Frank's conceptions of "realist jurisprudence" become widespread, new terrors may be in store for the law-school examinee. Following are two sample questions and answers from the paper on "Legal Strategy," in Law Finals of March, A.D., 1950. They are based on anecdotes related to me, the first by a very humble litigant, the second by a very famous living judge. For the purposes of the second, it must be assumed that in 1950, Victoria has reverted to the provisions of the Workers' Compensation Act 1928, Schedule 3, as to arbitrations and appeals therefrom in Workers' Compensation claims. (See as to the present position, Act No. 4524, s. 9).

Question 1. You are defending the local "rough diamond" on a charge of assaulting the municipal ranger. The charge will be heard by a country Court of Petty Sessions, which normally consists of a visiting Police Magistrate and local Justices of the Peace. The Justices are all Shire Councillors. Advise on procedure.

Answer. The Justices will certainly be biassed against the defendant, but are likely to insist on sitting, and their bias is unlikely to be such as to justify a reversal of their decision by the Supreme Court. In any case, defendant's means will probably not extend to an appeal. Accordingly, the correct procedure is to serve each Justice with a subpoena to attend court as a witness for the defendant. They will then be unable to sit. Of course, the Justices will not in fact be put in the box. The defendant will then be tried on a proper view of the onus of proof.

Question 2. You have obtained a favourable oral decision of an arbitrator at a hearing under the Workers' Compensation Act; the decision cannot be supported on the evidence given, and is likely to be reversed on appeal. How can you retain your award?

Answer. By preventing an appeal. To achieve this, refrain from preparing and taking out the formal written award. The other side is certain to serve notice of appeal promptly. After they have done so, take out the formal award, and lie low for fourteen days. An arbitrator's award is made on the date he signs it and not on the date he announces decision; hence you can now set aside the notice of appeal, since when it was served there was nothing to appeal against. But more than fourteen days having now expired from the actual issuing of the award, an appeal will be incompetent. (See County Court Act 1928, s. 74; Rules under Workers' Compensation Act 1928, r. 29; *Clayton v. Jones Sewing Machine Co.*, 1908, W.N. 253).

—GEOFFREY SAWER.